IN THE SUPREME COURT OF FLORIDA

ROBERT JEFFREY TREASE,

Appellant,

vs. **CASE NO. 89,961**

STATE OF FLORIDA,

Appellee.

_____/

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellant was charged by indictment with the first degree murder of Paul Edenson (Vol. I, R 31-32). Trease was charged in a subsequent information with burglary and robbery with a firearm (Vol. I, R 137-139). The jury returned guilty verdicts (Vol. X, R. 1846-1847).

PRE-TRIAL:

The lower court prior to trial granted defense motions to appoint a private investigator, Keith Steele (Vol. I, R 46), to appoint a penalty phase investigator and mitigation specialist, Cheryl Pettry (Vol. I, R 74), to appoint an expert pursuant to Florida Rules of Criminal Procedure 3.216 (Vol. III, R 482-484), to have court-ordered EEG examination performed (Vol. IV, R. 642-643), to compel disclosure of alcohol and/or drug treatment information and/or medical health and/or psychiatric treatment information, hospital records and Baker Act records of Hope Siegel (Vol. IV, R. 644-645; Vol. XIV, TR. 228-229), requesting a PET scan and appointment of Dr. Frank Wood (Vol. IV, R 706-707).

GUILT PHASE:

House cleaner Mary Mullen went to Paul Edenson's house on August 18, 1995, sometime after 1:00 P.M. She noticed his car was in the driveway which was unusual since he's never home when they arrive on Friday afternoon. She heard a loud noise inside which she later learned was the television blasting. After knocking and

receiving no answer she and Stephany Portell entered the house using a pass key and discovered the victim laying face down on the living room floor with his head in a pool of dried blood (Vol. XXII, TR 1490-92). Paramedics arrived ten minutes after the 911 call (Vol. XXII, TR 1493). The witness testified that Edenson had a jewelry box in his master bedroom, State's Exhibit 2 (Vol. XXII, TR 1495).

Robert Potter, a paramedic, stated that the victim was not breathing, had a gunshot wound to the head and it was obvious he was dead (Vol. XXII, TR 1498-1500). Officer Terry Winkel observed the victim laying on the floor (Vol. XXII, TR 1503). Winkel smoked Benson & Hedges Menthol cigarettes outside the house area in the yard -- outside the initial perimeter securing the crime scene which was later expanded. Winkel later gave a blood sample to compare it with the DNA on the cigarette butts (Vol. XXII, TR 1503-1505).

Associate medical examiner Dr. James C. Wilson observed the victim on the floor wearing a blue bathrobe. There was a large amount of blood around the upper chest, neck and head region extending outward on the hard, smooth stone floor (Vol. XXII, TR 1514). There was blood spatter in several areas, at least one fragment of tissue on a rug close to the body, there was some furniture that was ajar, evidence of a gunshot wound with a spent projectile deformed and lying on the floor (Vol. XXII, TR 1514).

Exhibit 36 depicted the piece of tissue about four to six feet from the body (Vol. XXII, TR 1520). Dr. Wilson observed the wound consistent with a gunshot wound to the right side of the head prior to turning the body over. There were also very deep, large incised wounds to the neck area (Vol. XXII, TR 1521). The tip of a rubber glove similar to the kind a doctor or health care professional might wear was under the head (Vol. XXII, TR 1522). There were multiple injuries to the face; the right eye globe had been damaged if not exploded and a few small marks in the left eye region were consistent with blunt impact (Vol. XXII, TR 1526). An autopsy revealed that the victim was 5'9" or 5'10" and weighed about 188 pounds (Vol. XXII, TR 1527). On the right side of the face was a contact range entrance wound (Vol. XXII, TR 1531). The exit wound was to the left of the midline in the forehead above the eyebrow (Vol. XXII, TR 1533). There were multiple fractures of the skull across the front of the head and injuries to the brain tissue in the frontal portions (Vol. XXII, TR 1534). The injury to the left eye was consistent with striking with the knuckles of the fist (Vol. XXII, TR 1536). He opined that the gunshot wound was consistent with a .38 caliber or 9 millimeter (Vol. XXII, TR 1538-39). X-rays revealed bullet fragments inside Mr. Edenson’s head (Vol. XXII, TR 1539). The frontal lobes of the brain are not involved directly with immediate motor and sensory activities or breathing (Vol. XXII, TR 1543). There were at least three separate

cuts to the neck beginning on the right side and the cutting motion was from right to left (Vol. XXII, TR 1550). All the tissues were incised from deep up towards the surface (Vol. XXII, TR 1555). The depth of the neck wounds was three to three and a quarter inches (Vol. XXII, TR 1556). The piece of tissue found on the rug a few feet away was muscle and a slice of the hyoid bone which is located above the larynx (Vol. XXII, TR 1557). To cut that bone and eject it would require an extremely powerful thrust or cutting movement (Vol. XXII, TR 1558). The victim's chin was clearly up out of the cutting area (Vol. XXII, TR 1559). The wounds are easily explained in a scenario wherein the perpetrator from behind the victim pulled the head back using the hair and slashing with a great deal of power (Vol. XXII, TR 1560-61). If the victim had only been shot he would have lived a matter of a few hours before he died (Vol. XXII, TR 1567). The injuries received by the victim would be consistent with his trying to push himself up off the floor (Vol. XXII, TR 1567). The carotid arteries were not cut (Vol. XXII, TR 1567-68).

Hope Siegel entered a plea of no contest as a principal to second degree murder of Paul Edenson and sentencing was scheduled for later in the month (Vol. XXIII, TR 1604). The plea called for a sentencing range of ten to twenty years imprisonment (Vol. XXIII, TR 1605). She knew appellant Trease when his hair was longer as depicted in Exhibit 10 (Vol. XXIII, TR 1606). Siegel met Trease before Christmas in 1994 and became his girlfriend. In early 1995

she accompanied him to Bayview Motors to try and sell his red Mercedes. They met Paul Edenson (Vol. XXIII, TR 1607). Appellant signed Exhibit 14, a consignment agreement with Bayview Motors; she believed he was left-handed (Vol. XXIII, TR 1609-10). Siegel and Trease visited with Edenson two or three times at Bayview Motors (Vol. XXIII, TR 1610). She separated from appellant in the spring of 1995 and met David Shorin (Vol. XXIII, TR 1612). While dating Shorin he indicated that he was a sharpshooter (Vol. XXIII, TR 1614). She asked Shorin to give her gun lessons but it never happened (Vol. XXIII, TR 1614). Siegel subsequently got back together with Trease and they took a trip to Biloxi, Mississippi (Vol. XXIII, TR 1615). In June of 1995 she and Trease burglarized Shorin's house -- appellant was always asking if she knew anybody who had guns or money and she told appellant she remembered Shorin had a gun shop -- and Trease took the safe (Exhibit 27) and put it in the truck. Guns and money were inside it (Vol. XXIII, TR 1616-1619). Appellant left town with the guns. She saw Shorin while Trease was gone but did not tell him she had committed the burglary (Vol. XXIII, TR 1620). When Trease returned he still had some of the guns including the Glock (Exhibit 9)(Vol. XXIII, TR 1621). There was also a holster (Exhibit 32) and magazines for the gun. She and Trease bought latex gloves during the summer of 1995 (Vol. XXIII, TR 1622). Trease told her different things about being associated with law enforcement agencies such as the DEA and FBI.

Siegel had worked for the Sarasota Sheriff's Department and had two shirts that said police on them (Vol. XXIII, TR 1625). After his return from law Vegas, Trease stayed with her on occasion at her parents' house in Bradenton while her parents were in Pennsylvania. She observed him practice martial arts (Vol. XXIII, TR 1626). Prior to August 17, appellant indicated that he knew or wanted to find out if Paul Edenson had a safe at Bayview Motors and he asked Siegel to call him (Vol. XXIII, TR 1627-28). At Trease's direction Siegel called Edenson and told him that Trease was out of the picture and she was supposed to try and get together with the victim to find out if he had a safe or money (Vol. XXIII, TR 1628). On August 17 at her house Trease asked Siegel to call Edenson again and make a date to get together with him, in order to find out if he had any money. Although she didn't want to, she called him (Vol. XXIII, TR 1629-30). At first she dialed different numbers so appellant would think she was talking to Edenson but Trease didn't believe her so Trease picked up the phone, called Edenson and handed her the phone (Vol. XXIII, TR 1630-31). Edenson gave directions to his house (Vol. XXIII, TR 1632). Appellant told her to get dressed up and she put on a black dress and high heels; her hair was strawberry-blond color (Vol. XXIII, TR 1633). Appellant was wearing a blue denim shirt, blue jeans and moccasins (Vol. XXIII, TR 1634). She drove and appellant had the Glock in the back of his pants. Trease told her to drop him off at the bar Cha Cha

Coconuts and instructed her to find the safe and to look in the bedroom (Vol. XXIII, TR 1637-38). She parked in Edenson's driveway and went inside; the victim said he was going to take a shower (Vol. XXIII, TR 1640). Edenson seemed sad and mentioned that his business was down forty thousand dollars (Vol. XXIII, TR 1644). Edenson got on the phone and called Chinese Palace for a delivery. Siegel did not look around the house for a safe, she only noticed a hole in the fireplace (Vol. XXIII, TR 1646). She mentioned to Edenson about seeing a friend at Columbia and he suggested she walk; Siegel walked to Cha Cha Coconuts and saw Trease sitting at the bar with two women (Vol. XXIII, TR 1647-48). She noticed one of the women giving him a number. Siegel sat down and looked at him. She was upset. They walked out and argued. Trease was mad, claiming the two Brazilian women had money and she had messed things up (Vol. XXIII, TR 1649-51). She told appellant that she had looked for a safe (but really hadn't) and that he didn't have one and Edenson claimed he was down forty thousand dollars. Trease was mad and didn't believe her (Vol. XXIII, TR 1651). Trease instructed her to go back to the victim's house and that he would be behind her; Siegel recalled passing a tall man who smelled good (Vol. XXIII, TR 1653-54). When she walked inside Edenson locked the door (Vol. XXIII, TR 1655). She heard a knock and told Edenson she was going to her truck for cigarettes -- she didn't know if appellant was there (Vol. XXIII, TR 1657). Edenson unlocked the

door and Trease was crouched down with both hands in a claw-like gesture. He pushed the door open, hit the victim in the nose and knocked him to the ground. Edenson got up, pulled appellant's shirt and Trease fell back (Vol. XXIII, TR 1658-59). Appellant was wearing latex gloves on both hands (Vol. XXIII, TR 1658-60). Trease said "you ripped my shirt" (Vol. XXIII, TR 1661). Appellant made a weird sound, got the victim on the ground, put his knee on his back and pulled the victim's head back (Vol. XXIII, TR 1663). Trease asked if he had a safe or money and Edenson insisted he had no safe, only jewelry in a jewelry box (Vol. XXIII, TR 1664). Trease grabbed Siegel by the back of the hair and told her to get the gun in the truck and she did so (Vol. XXIII, TR 1665). Trease put the gun to Edenson's head, asked him if he wanted to live and kept asking about a safe (Vol. XXIII, TR 1666). Siegel heard a gunshot while she was by the door and there was blood everywhere. Edenson tried to push himself up. Trease told her to get a knife in the kitchen and she gave it to him (Vol. XXIII, TR 1667-68). She saw Trease cut his throat three times while holding his head back (Vol. XXIII, TR 1669-70). At appellant's direction she took a jewelry box and a bullet casing and appellant gave her the knife to put in a bag. She also picked up the tip of his glove from the floor (Vol. XXIII, TR 1672). Outside in the car Trease told her he heard the victim's last breath and that Trease liked it (Vol. XXIII, TR 1674). Appellant burned their clothes in the fireplace

of her house (Vol. XXIII, TR 1675). As for the items in the bag appellant said he was going to throw it in a lake or river (Vol. XXIII, TR 1677). Exhibit 48 was the bag. Appellant put holes in the bag so it would sink. The bag and the safe were thrown in a river by Trease (Vol. XXIII, TR 1680-81). Trease kept the Glock for protection (Vol. XXIII, TR 1681). Afterwards they went to a bar, Tink's Lounge (Vol. XXIII, TR 1727), left her mother's messy house and drove north in her truck on I-75 (Vol. XXIII, TR 1728). Siegel had a stun gun in her purse which she had purchased a couple of months earlier in appellant's presence (Vol. XXIII, TR 1729). She had never used the stun gun on a person; appellant was aware that she had it (Vol. XXIII, TR 1730). They decided to go to Pennsylvania where her friend Heather Tomlinson lived. On the way north appellant threatened her, telling her if she testified against him someone else would find her if he couldn't (Vol. XXIII, TR 1731-32). He instructed her not to be stopped by the police or he would "cap" the policeman and her. Trease told her that he would kill her mother if she found out that Hope was with him (Vol. XXIII, TR 1733). Appellant informed Siegel he was going to marry her so that she couldn't testify against him (Vol. XXIII, TR 1733). Appellant explained that they had to leave Florida because he could get the electric chair. He said he killed Edenson because he could identify them and he tore his shirt. Appellant became angry when she got emotional telling her "to get my shit together" (Vol.

XXIII, TR 1734). On the way to Pennsylvania she called her mother who had returned to Bradenton to get money (Vol. XXIII, TR 1735). Siegel was scared to contact police (Vol. XXIII, TR 1736). She was apprehended by Pennsylvania police and gave them information and also talked to Sarasota detectives when they arrived (Vol. XXIII, TR 1738-39). She told detectives about the Brazilian women at Cha Cha Coconuts and the well-dressed man she passed wearing the cologne and being at Tink's Lounge (Vol. XXIII, TR 1742-43).

On cross-examination Siegel was asked about her seven month employment with the sheriff's office (Vol. XXIII, TR 1748) and the brain injury she received following a 1992 automobile accident (Vol. XXIII, TR 1749). As a result of her auto accident she had problems with her memory for recalling new information (Vol. XXIII, TR 1758). She conceded not telling Mr. Shorin of her participation in the burglary of his residence (Vol. XXIII, TR 1763). She was upset when the woman at Cha Cha's gave her phone number to Trease (Vol. XXIII, TR 1777). Siegel insisted that she did not touch Edenson when Trease assaulted the victim (Vol. XXIII, TR 1790). She denied shooting the victim or cutting his throat (Vol. XXIII, TR 1793). Siegel denied telling Tonya Sterling that appellant made her put her hand on the gun, held her hand and that she shot Edenson (Vol. XXIII, TR 1805). She denied telling Janene Silkwood that she killed Edenson by herself (Vol. XXIII, TR 1807). She was originally charged with first degree murder but pled to second

degree murder on October 7, 1996 (Vol. XXIII, TR 1811).

On redirect she admitted having given details of her case to Janene Silkwood who was similarly involved in a murder and an ex-husband (Vol. XXIII, TR 1823-24). She and Silkwood had a falling out in early 1996 (Vol. XXIII, TR 1829).

Lisa Magana, a court reporter, testified that at a hearing on September 18, 1996, Trease stated under oath that he was left handed (Vol. XXIV, TR 1845-48). The defense stipulated that Trease was left handed (Vol. XXIV, TR 1849).

Mary Siegel, Hope's mother, testified that Hope Siegel had an automobile accident in 1992 and among the changes resulting from that accident were forgetfulness, difficulty in taking things in, and she would cry more. Hope became more frustrated, upset and angry (Vol. XXIV, TR 1851-55). Her attention span got worse after the accident (Vol. XXIV, TR 1856). The witness learned in late 1994 that Trease had entered her daughter's life (Vol. XXIV, TR 1856). Mary Siegel met appellant once in March of 1995 and learned that sometime in the spring Hope and Trease had separated. Then the witness learned that Hope took a trip to Biloxi, Mississippi in May of 1995 with Trease (Vol. XXIV, TR 1858). In the summer of 1995 Mary and her husband (employed as a golf professional in Pennsylvania) and Hope's nine year old daughter Chelsea went to Pennsylvania. Hope was left at the Bradenton home (Vol. XXIV, TR 1859-60). The schedule called for their return to Bradenton by

August 18 for Chelsea's return to school; Mr. Siegel was going to stay in Pennsylvania (Vol. XXIV, TR 1860). When she returned to the Bradenton home on August 18 the witness discovered that it was very messy; the spice rack was gone (Vol. XXIV, TR 1861-62). Later in the fireplace there were thin pieces of metal (Vol. XXIV, TR 1862). She found a pill bottle with appellant's name and his motorcycle license plate and tool box (Vol. XXIV, TR 1863). Days later she got a phone call from Hope. She was nervous and scared and not herself (Vol. XXIV, TR 1864). Hope told her mother that something bad happened and she was there but couldn't prove that she didn't do anything (Vol. XXIV, TR 1870). She said she was at the wrong place at the wrong time. The witness worked with police in trying to find her daughter. She wired money to Hope (Vol. XXIV, TR 1871-72).

Rick Goldman, an employee of Auto Trim Design in Bradenton, testified that he was at Edenson's Bayview Motors on August 17, 1995 at 6:30 P.M. and was present when Edenson was making a phone call to a female between seven and seven-thirty (Vol. XXIV, TR 1876-79). He gave directions to a house near St. Armands Circle (Vol. XXIV, TR 1880). The witness identified photos of Paul Edenson (Vol. XXIV, TR 1883).

Christopher Gauthier received a delivery food order at China Palace Express on Siesta Key on August 17, 1995 shortly before nine o'clock (Vol. XXIV, TR 1887). A man placed the order over the

phone and a woman's voice in the background was involved in the food decision making (Vol. XXIV, TR 1888). Gauthier arrived at 232 North Boulevard of the Presidents at about 9:55 P.M. (Vol. XXIV, TR 1890). In front of the house were a Mercedes-Benz, a sport coupe, a Cadillac and a white pickup truck (Vol. XXIV, TR 1891). A man wearing a dark bathrobe came to the door and the witness turned the food over to Mr. Edenson. He did not see anyone in the living room area but he heard either a woman's voice or television (Vol. XXIV, TR 1894). There were no observable injuries to the man's face (Vol. XXIV, TR 1895).

Marshall Weldy, GET security manager, oversees the production of and searches for telephone records (Vol. XXIV, TR 1902). In response to a subpoena he did two searches, a universal measure service type search and an early toll retrieval type search of toll calls (Vol. XXIV, TR 1904). One of the numbers searched for, (941) 365-1940, was for Bayview Motorcars (Vol. XXIV, TR 1905). One of the highlighted calls at 7:01 P.M. on August 17 was from 941-739-1052, a number assigned to Curt Siegel (Vol. XXIV, TR 1906). A third entry at 7:10 P.M. was from that number to 941-365-1940 Bayview Motors. An intervening second call was to directory assistance requesting information on the Bayview Motors number (Vol. XXIV, TR 1908). State Exhibit 13 verified the call from 739-1052 to 365-1940 on August 17, and on August 15 at sixteen minutes after midnight there was a directory assistance direct dialed call

to 941-364-9335 (Vol. XXIV, TR 1912).

Edward Kolek testified that while walking to the Columbia's Restaurant just after 10:00 P.M. on August 17, 1995 -- and wearing Lapidus cologne -- he passed a woman wearing a tight-fitting Spandex type silver gray dress with black high heels and a man following her seventy-five feet behind (Vol. XXIV, TR 1915-1919). He concluded that it must be a lover's quarrel (Vol. XXIV, TR 1921). Later at about 12:30 he walked home and heard a sound and saw dim lighting at the Edenson house (Vol. XXIV, TR 1922). The next day he saw police cars and crime tape at Paul Edenson's house. He informed police about the noise he had heard there but did not mention the man and woman he had passed since he made no connection with the two incidents (Vol. XXIV, TR 1925-1926). On the following Friday he saw the pictures of the man and woman on television -- he immediately recognized the man's photo -- and called police (Vol. XXIV, TR 1927-1928). Appellant in court appeared to be the same man with his hair shorter (Vol. XXIV, TR 1928).

On August 25, 1995, Beth Muniz, public information officer with the Sarasota Police Department, released a photo of Trease to the media following his August 17 arrest for the Edenson homicide (Vol. XXIV, TR 1935-1936).

Ismail Elginer, a former employee of Bayview Motorcars, saw appellant Trease there in February of 1995. Trease brought in a 1983 Mercedes-Benz and he came in almost everyday for a week with

his girlfriend (Vol. XXIV, TR 1938-1939).

Margarida Wortmann of Brazil went to St. Armands Circle about 9:15 on August 17, 1995 with her friend, Edjanira Viana (Vol. XXIV, TR 1945). They entered the Cha Cha Coconuts lounge about 9:30 and a man was sitting next to Edjanira; the man was depicted in the photo exhibit 10 (Vol. XXIV, TR 1947-1948). Her friend wrote her phone number on a piece of paper and the man took it from her hand when he left. A nervous looking woman came in and sat down with the man (Vol. XXIV, TR 1949-1950). Appellant said he knew her, that she was police (Vol. XXIV, TR 1951-1952). The man and woman left and appeared to be arguing (Vol. XXIV, TR 1955).

Edjanira Viana was with her friend Margarida at Cha Cha Coconuts on the evening of August 17, 1995. She identified appellant in court as the man who sat next to her (Vol. XXIV, TR 1969-71). He said his name was Robert; she was wearing jewelry, maybe five or six rings. He asked for her phone number and she wrote it on a piece of paper (Vol. XXIV, TR 1972-1977). Trease told her he was police. A nervous woman sat next to appellant (Vol. XXIV, TR 1978). He said he had to go because the woman was also with the police (Vol. XXIV, TR 1979).

The state and defense stipulated that the photo of appellant, exhibit 10, was taken on February 16, 1995 (Vol. XXIV, TR 1988).

Crime scene technician Jackie Scogin discussed the gathering of evidence at the crime scene and evidence acquired from the

Pennsylvania state police as well as items recovered from the Braden River (Vol. XXIV, TR 1992-2037).

Crime scene technician Janet Elser attended the Edenson autopsy and described the items collected (Vol. XXIV, TR 2058-2059).

Sergeant Howard Hickok supervised technicians Scogin and Elser (Vol. XXIV, TR 2060). He recovered a latent print of value from the front door interior of the Edenson home (Vol. XXIV, TR 2061). He was also a member of the dive team that recovered a large plastic bag depicted in photo exhibit 48 (Vol. XXIV, TR 2062).

Heather Tomlinson, a Pennsylvania friend of Hope Siegel, testified that Siegel and appellant visited her in August of 1995, a couple of days before Hope's arrest (Vol. XXV, TR 2078-2079). She saw Trease in possession of a black handgun, a stun gun and a gun that looked like a tire gauge (Vol. XXV, TR 2081). She saw Trease put the gun in the mattress of the bed where he and Hope were sleeping (Vol. XXV, TR 2083). Hope's demeanor and emotions changed when she was not in the presence of appellant; she was crying, shaking and visibly upset right after Trease left her presence (Vol. XXV, TR 2084-2085). Hope told her she would never see the witness or her family again, that she was stuck with appellant for the rest of her life and that she couldn't tell what she knew or what he was capable of (Vol. XXV, TR 2086). Heather began asking questions and Hope answered that he hadn't robbed a

bank, answered no when asked if he killed anyone and then Hope asserted that she couldn't let Trease know that she'd been crying and went into the bathroom to wash her face (Vol. XXV, TR 2088). After a discussion both defense counsel and appellant agreed it would be preferable not to give a limiting instruction on the proffered testimony that Trease asked the witness if she knew anyone with money, with a safe, to rob. The court did instruct the jury, with defense counsel's concurrence that appellant was not on trial for anything other than the crimes charged (Vol. XXV, TR 2089-2098).

Tomlinson testified that appellant asked her if she knew anybody or stores that had a safe to rob (Vol. XXV, TR 2100). She observed appellant take medication – Valium and Vicodin – which he claimed was for a heart condition (Vol. XXV, TR 2101). Tomlinson left the apartment with Hope to get money that was supposed to be wired by Hope's mother and police pulled them over and arrested Hope (Vol. XXV, TR 2101-2102). The witness gave authorities consent to search her apartment (Vol. XXV, TR 2102).

Trooper Richard Terek of the Pennsylvania state police learned there was a fugitive witness warrant for Hope Siegel and that Hope Siegel and appellant were at the Pine Apartments. A surveillance was also set up (Vol. XXV, TR 2109-2110). Surveillance was also set up at a Western Union shop in Latrobe ten miles away. The white Chevy S-10 pickup truck carrying Siegel and Tomlinson passed

by at 6:39 P.M. on August 24, 1995 (Vol. XXV, TR 2110-2111). They stopped the truck, the vehicle was searched and a brown shoulder holster was behind the driver's seat. Hope told them the gun was at the apartment with her boyfriend Trease (Vol. XXV, TR 2111-2112). When police entered the Tomlinson apartment, appellant made a leaning motion toward him but stopped when he saw Terek's gun pointed at him (Vol. XXV, TR 2115). Trease was told he was not under arrest and informed the officer the gun was in the bedroom between the box spring and mattress. Appellant was read his Miranda rights (Vol. XXV, TR 2116). Trease agreed to talk. Trease admitted coming to Pennsylvania from Sarasota with Hope Siegel. At this point the witness was unaware that Trease was wanted for a murder (Vol. XXV, TR 2118). The gun was recovered where appellant said it was. Appellant explained that Hope had found the weapon at her mother's place, in the back yard by the pool. Trease also mentioned having a pen gun, can of mace and a Taser stun gun (Vol. XXV, TR 2119-2120). Trease reported that he had a heart condition and they allowed him to take medication (Vol. XXV, TR 2121). Trease was later told that he was being placed under arrest for murder at 9:30 P.M., August 24 (Vol. XXV, TR 2121-2122). Appellant vehemently denied any involvement and asked how Terek had found out about this. He said he didn't believe Hope would say anything like that and wanted to talk to her. When told that Sarasota detectives had information about the homicide, appellant expressed the desire

to talk to them when they arrived (Vol. XXV, TR 2122).

FBI agent mark Sykes similarly described the apprehension of Siegel and Trease (Vol. XXV, TR 2125-2136) as did Corporal Roger Pivirotto (Vol. XXV, TR 2138-2144) and FBI agent John Gera (Vol. XXV, TR 2146-2150) and Corporal Robert Stauffer (Vol. XXV, TR 2150-2155).

George Lowther testified that appellant had the hair shaved off his head while incarcerated at the Pennsylvania facility on August 26, 1995, and his hair was collected by authorities in case the detectives needed it (Vol. XXV, TR 2159-2162).

Margarida Wortmann testified that the man sitting next to her at Cha Cha Coconuts asked her friend for her phone number. Her friend responded that she didn't have a phone because she was poor and Wortmann told him she's lying, she has a phone number and is a very rich woman (Vol. XXV, TR 2195-2196).

David Shorin met Hope Siegel in the spring of 1995, dated her a few times and owned a variety of firearms (Vol. XXV, TR 2198-2199). Shorin owned a safe in his home; his apartment was burglarized on June 25, 1995, and the items taken included a Glock 19 with thirty round magazine, a Taurus .357 revolver, a Beretta .22 automatic, a pen gun and other guns, bullets and knives. Exhibit 27 was the safe he had (Vol. XXV, TR 2200-2204).

Deputy Heidi Rodgers Pittman responded to the reported burglary of the Shorin residence. The point of entry was a bedroom

window, no fingerprints of comparison value were obtained and numerous items of value in plain view were not taken. A safe and some weapons were on the list of items reported stolen (Vol. XXV, TR 2221-2223).

Becky Bishop knew appellant when she lived in Sarasota; she met him at Gecko's restaurant the week before Halloween in 1994 (Vol. XXV, TR 2226-2228). She gave him her phone number and he called her three days later. They dated for about a month. Appellant told her he was a drug enforcement agent and she saw him practicing karate moves in front of a mirror (Vol. XXV, TR 2229-2232). Trease told her they could make a lot of money but the court granted a defense motion to strike and instructed the jury to disregard the question and answer about whether she had any rich clients (Vol. XXV, TR 2234-2235). The court denied a subsequent mistrial motion regarding Ms. Bishop's testimony (Vol. XXV, TR 2238).

Trooper Harry Keffer of the Pennsylvania State Police assisted the Sarasota Police Department in the homicide investigation. On August 24, 1995, while conducting surveillance in the area of the Pines Apartments, Keffer was present shortly after a 1988 Chevy S-10 pickup truck was stopped. Hope Siegel was taken into custody pursuant to a federal material witness warrant (Vol. XXVI, TR 2253-2254). He gave her Miranda warnings and she signed a waiver at 8:21 P.M. (Vol. XXVI, TR 2254). She agreed to talk about the

homicide even though she was not under arrest for that crime. Keffer was not aware that she was involved in it. No promises or threats were made to her (Vol. XXVI, TR 2255). After talking to her for about an hour and a half Siegel agreed to give a taped statement at 10:00 P.M. Exhibits 99 and 100 were admitted into evidence and the tape (Exhibit 100) was played to the jury (Vol. XXVI, TR 2256-2262; TR 2263-2318).

Corporal Stauffer was recalled and testified that when he searched Hope Siegel's white Chevy S-10 pickup truck he located a stun gun in a purse in the front seat, Exhibit 7 (Vol. XXVI, TR 2329). Other items retrieved in a gym bag included an empty bullet clip, a thirty-one round Glock clip, a male golf shirt, male socks and latex gloves (Vol. XXVI, TR 2333).

Doug Gaul, FDLE crime lab analyst assigned to the latent print section, testified that he was not able to obtain any latent prints of value from the rubber glove tip (Exhibit 16), the handgun and magazine (Exhibit 9), live rounds of ammunition (Exhibit 77), one magazine and fold over plastic bag (Exhibit 29) (Vol. XXVI, TR 2338).

Billy Hornsby, FDLE crime lab analyst in the ballistics section, testified that the Exhibit 9 Glock 9 mm. pistol and magazine was functioning properly and the trigger pull was approximately six pounds (Vol. XXVI, TR 2346). The sixteen unfired 9 mm. Luger cartridges consisted of four Federal hydroshocks, ten

Winchester Black Talons, and two Glaser safety slugs (Vol. XXVI, TR 2346-2347). Exhibit 30 was a Federal brand cartridge case found under the seat of the white Chevy S-10 pickup (Vol. XXVI, TR 2347). Hornsby determined that the Exhibit 30 cartridge case was fired from the Exhibit 9 Glock and the fragments recovered from the crime scene (Exhibits 21-25) were too damaged for him to determine whether fired from a particular weapon (Vol. XXVI, TR 2348-2349).

Marta Strawser, FDLE crime lab analyst in the hair section, determined that head hair samples from appellant and from victim Edenson were not suitable for comparison (Vol. XXVI, TR 2362). She described the hairs that were submitted to her from the scene, none of which she would describe as long strawberry blonde (Vol. XXVI, TR 2362-2364).

Kathy Benjamin, FDLE forensic serologist, received known blood samples of Robert Trease, Hope Siegel, Paul Edenson and officer Terry Winkel. All had different DNA profiles (Vol. XXVII, TR 2384-2385). She got results on Exhibit 31 (hairs removed from the victim's robe), Exhibit 32 (hairs from the right shoulder of the victim's robe), Exhibit 46 (hairs from the sheet), Exhibit 56 (trace evidence from the right hand), Exhibit 47 (from the bathrobe), Exhibit 58 (trace evidence from the face and mouth) (Vol. XXVII, TR 2390-2391). The DNA profiles on the hairs matched Paul Edenson (Vol. XXVII, TR 2392). Other hairs tested were inconclusive. Bloodstains that were recovered either belonged to

Paul Edenson or were inconclusive (Vol. XXVII, TR 2394). Fingernail clippings were consistent with Edenson and of two cigarette butts one was consistent with originating from Officer Winkel and the other inconclusive (Vol. XXVII, TR 2396). The Exhibit 72 holster had a spot of blood and the DNA was appellant's (Vol. XXVII, TR 2396). None of the items tested matched the DNA profile of Hope Siegel (Vol. XXVII, TR 2398).

FDLE shoe print impression expert Ed Guenther opined that the shoe in the photograph Exhibit 47 could have left the impression in Exhibit 20 (Vol. XXVII, TR 2408).

Kathleen Lundy of the FBI Materials Analysis Unit testified that the fragments and jackets on the bullets tested were the same alloy class, about 90% copper and 10% zinc (Vol. XXVII, TR 2418). She excluded Black Talons and Blue Tips as used in the homicide. One Federal round was consistent with the lead fragments found at the scene (Vol. XXVII, TR 2420-2421) and Exhibit 30, a spent casing recovered under the seat of the pickup truck was a Federal (Vol. XXVII, TR 2421). The fragments and bullet case of the Federal cartridge were all manufactured from the same source of lead as the Federal ammunition plant in Minnesota (Vol. XXVII, TR 2422).

Jeffrey Colson had a business relationship with the appellant a couple of years earlier and at a dinner at Trease's home in Las Vegas appellant demonstrated a movement showing proficiency in the martial arts. Trease said he was a black belt Karate (Vol. XXVII,

TR 2441-2442). Trease also displayed handmade knives and demonstrated how they might be used to disable another person (Vol. XXVII, TR 2443). Trease demonstrated to Colson moving the knife across the throat while face to face (Vol. XXVII, TR 2444-2445).[1]

Brigitte Berousek dated appellant from February to the end of May in 1995. She did not see him in August (Vol. XXVII, TR 2449-2450). She did not see him the night of the homicide although she was living with him during this time. In March of 1995 he asked her if she knew anybody that had valuables, drugs, money or safes to burglarize them. When living with him she observed him practice martial arts (Vol. XXVII, TR 2450-2451). On August 15, 1995 she received a phone call at work (364-9335) about midnight from appellant (Vol. XXVII, TR 2452).

In April she met Hope Siegel who had a prior relationship with Trease (Vol. XXVII, TR 2453) and Siegel appeared to be angry and upset (Vol. XXVII, TR 2455). (On a proffer outside the jury's presence the witness stated that on that occasion Siegel appeared to be under the influence of drugs or alcohol.)(Vol. XXVII, TR 2462).

Detective Ralph Robinson observed the victim lying inside his home wearing a large gold necklace and gold bracelet on August 18,

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[1]Defense counsel informed the court and Trease confirmed that he did not want counsel to attempt to impeach Colson by showing he had a prior felony conviction since it would give the jury the impression he hung around with convicted felons (Vol. XXVII, TR 2447-2448).

1995 (Vol. XXVII, TR 2482). Investigation using phone records from Edenson's Bayview Motorcars business led to Hope Siegel. A Chevy S-10 pickup truck was registered to Hope Siegel and they were looking for a female (Vol. XXVII, TR 2482-2483). They went to her mother Mary Siegel's residence on August 24 and later that evening learned that Hope had been picked up by Pennsylvania authorities. Robinson and Detective Wildtraut flew to Pennsylvania the next day and learned that Trooper Keffer had taken a statement from her and the witness talked to Siegel on the 26th (Vol. XXVII, TR 2484-2485). She was cooperative and gave a more detailed statement than Keffer provided. Siegel informed him about two Brazilian women with Trease at Cha Cha Coconuts on August 17 and Robinson succeeded in finding them on July 16, 1996 (Vol. XXVII, TR 2485-2486). He also was able to verify information she furnished about her going to Tink's Bar with Trease after the homicide (Vol. XXVII, TR 2486). He located waitress Rebecca Bostic (Vol. XXVII, TR 2487). Robinson interviewed appellant at 1945 hours on August 26 and after Miranda warnings Trease initially couldn't remember where he was on the 17th (Vol. XXVII, TR 2488-2489). Trease claimed he would have been staying at the Siegel residence on the 17th and indicated that he both knew and didn't know St. Armand's Circle in Sarasota (Vol. XXVII, TR 2490-2491). Trease admitted he had been at Cha Cha Coconuts but wasn't sure if he was there Thursday, August 17 (Vol. XXVII, TR 2492). He claimed he didn't own a gun and explained that

the nine millimeter recovered in Heather Tomlinson's apartment was found by Hope Siegel on the bank of a creek (Vol. XXVII, TR 2493).

After Ms. Siegel was transported back to Sarasota and on September 11 assisted police in locating the safe and a bag she had thrown into a river. Both were found where she indicated (Vol. XXVII, TR 2495-2497). The bag contained a knife protruding through a plastic bag (Vol. XXVII, TR 2498). Trease explained on August 26 he was taking medication, Valium and hydrocodone for a heart condition (Vol. XXVII, TR 2498-2499). Ms. Siegel demonstrated how Trease had slit the victim's throat but said but said she wasn't sure which hand he used (Vol. XXVII, TR 2507).

Detective Daniel Wildtraut added that Mary Siegel had wired money to Hope (Vol. XXVII, TR 2511). Trease claimed in his interview that he had previously taken a 1980 Mercedes he owned to Bayview Motors and met with Paul Edenson and tried to work out a deal where Bayview Motors would take the vehicle on consignment but they could not agree on a price (Vol. XXVII, TR 2518). Trease wanted to talk to Wildtraut again on September 6, 1995. Trease stated that he wanted to speak to Hope Siegel, that she was only twenty-four years old with a baby and that "he might have to take the fall for her" (Vol. XXVII, TR 2519-2520). On September 11 appellant wished to speak to Wildtraut again; Trease asked if Siegel had been charged with anything, stated that he didn't want her charged with anything and that she did not kill Edenson (Vol.

XXVII, TR 2521). Trease stated he didn't kill the victim either, that he was forty-five years old and didn't care whether he lived or died (Vol. XXVII, TR 2522). At the end of the conversation Trease blurted out "did you get wet?" (Vol. XXVII, TR 2522). When asked what he meant by that Trease stated that he heard they were diving for evidence in Florida (Vol. XXVII, TR 2522). On September 18, Wildtraut called Trease pursuant to the latter's request and appellant denied the killing, stating that if he had would he be stupid enough to keep a witness or be caught by police with the murder weapon. After hesitating he asked if the witness knew that was the murder weapon. Trease stated that he would be found not guilty, that he didn't care what happened to Hope Siegel and she could fry for what she did to him. He claimed to have an airtight alibi (Vol. XXVII, TR 2524). On September 28 Wildtraut went to the Edenson residence and located some knives that appeared to match the knife found in the river (Vol. XXVII, TR 2525).

Psychiatrist Dr. Daniel Sprehe testified that Valium (diazepam) and Vicodin (hydrocodone) are not heart medications. The former is a mild tranquilizer to relieve anxiety and would not cause impairment of memory and the latter is an analgesic, a weaker than morphine pain killer which also would not cause memory loss over a period of time (Vol. XXVII, TR 2537-2538). Sprehe reviewed the dosages administered to Trease at the Westmoreland County jail August 25 through August 31 and opined they would have negligible

effect on the ability to remember or recount events in the previous seven to ten days (Vol. XXVII, TR 2538-2540).

Lieutenant Gordon Hoffmeister, an experienced instructor in stun guns with the sheriff's office, testified that Exhibit 7 was an imitation type stun gun made in Korea which he tested on himself and it did not render him immobile, cause him to drop to the ground or stop him from carrying on a conversation (Vol. XXVII, TR 2552-2553). Stun guns can leave marks on the body (Vol. XXVII, TR 2553). If placed on someone's back through a robe long enough to render the person immobile there would be signature marks on the body (Vol. XXVII, TR 2556).

The defense called Rebecca Bostic, an employee of Tink's Lounge, who observed appellant and his female companion on August 17-18, 1995 (Vol. XXVIII, TR 2572). On cross-examination, the witness admitted that she did not go to the bathroom to see if Trease's companion was crying, the bar was dark that night and she didn't notice scrapes or bruises on the hands of either customer (Vol. XXVIII, TR 2579-2580).

Outside the presence of the jury Heather Ciambrone declined to answer any questions regarding statements of Hope Siegel, asserting her Fifth Amendment privilege of self-incrimination (Vol. XXVIII, TR 2584-2586).

Janene Silkwood testified that she was in the same Manatee County jail cell in 1995 with Hope Siegel (Vol. XXVIII, TR 2593).

Silkwood was currently serving a sentence for conspiracy to commit first degree murder, grand theft auto, burglary of a dwelling and accessory after the fact (Vol. XXVIII, TR 2595). The witness claimed that she helped Siegel write a letter to Trease because Siegel hoped Trease would respond and incriminate himself (Vol. XXVIII, TR 2597). Hope told her in December of 1995 that she shot Edenson and had slashed his throat and used a stun gun on the victim (Vol. XXVIII, TR 2598-2599). Hope also told her that she was a witness to Trease killing the victim and that it was a Mafia hit (Vol. XXVIII, TR 2600). Siegel and Silkwood had a subsequent falling out and in March 1996 the witness wrote a letter to Trease (Vol. XXVIII, TR 2601). The witness claimed that Siegel was laughing when she described killing Edenson (Vol. XXVIII, TR 2604).

On cross-examination, the five-time convicted felon witness admitted that Siegel was emotional and crying when she related that appellant had shot and sliced the victim's throat (Vol. XXVIII, TR 2605-2606). She was so upset she had a paralytic attack. Siegel told her that Trease had worn rubber gloves (Vol. XXVIII, TR 2606-2607). Siegel also told her that she didn't leave the defendant because she was afraid he'd kill her family and that he'd kill a police officer if they were pulled over (Vol. XXVIII, TR 2607). Siegel and Silkwood told each other a lot about their respective cases because there were similarities, involving a male codefendant who was the major culprit (Vol. XXVIII, TR 2608). Throughout their

discussions between September and December of 1995 Siegel seemed genuinely scared and would cry hysterically when detailing the murder (Vol. XXVIII, TR 2608-2609). Silkwood did not tell any police officers, attorneys or detectives about Siegel's December admissions until March of 1996 (Vol. XXVIII, TR 2610-2611). After December of 1995 she and Siegel had an argument and Silkwood had great animosity toward her (Vol. XXVIII, TR 2612). After this animosity developed Silkwood told about the so-called second version of events (Vol. XXVIII, TR 2612) and she sent a friendly letter to Trease; in this second version Silkwood claims Siegel told her that Trease was not even present, that he was with a girlfriend named Bridgette (Vol. XXVIII, TR 2603), that Siegel claimed she used a stun gun on the victim's back and was carefree and unemotional when relating it (Vol. XXVIII, TR 2613-2614). Silkwood gave a twenty-three page sworn statement to defense investigator Steele on March 7, 1996 during the peak of her animosity with Siegel and never mentioned Siegel's prior statements from September to December 1995 in which she had emotionally recited the details of Trease committing the murder (Vol. XXVIII, TR 2615-2617). Silkwood told Steele on March 7 she believed Siegel was telling the truth in the second version but she was not telling the truth when she said that under oath (Vol. XXVIII, TR 2619). In her deposition of November 29, 1996 Silkwood admitted that she was not truthful to Steele was because of her animosity to Siegel; she

was upset with her because Silkwood felt Siegel was communicating with her ex-husband (Vol. XXVIII, TR 2620-2621). She admitted being internally inconsistent in her statement (Vol. XXVIII, TR 2622). After giving this second version, when interviewed by Sarasota Police Detective Robinson, Silkwood reported the first version given by Siegel (which she hadn't told defense investigator Steele). In fact she told Robinson that the second story sounded crazy (Vol. XXVIII, TR 2624-2625). She admitted she thought her talking to Steele would be the end of it and was upset and surprised when called to testify and realized that repeating what she told Steele would assure she wasn't charged with perjury. Silkwood acknowledged taking the Fifth Amendment at the first deposition because it could subject her to perjury charges (Vol. XXVIII, TR 2625-2627). She had a change of heart about testifying when the judge gave her a six-month jail sentence (Vol. XXVIII, TR 2627) and she was testifying to get out of the six months contempt incarceration (Vol. XXVIII, TR 2628).

Tonya Sterling, another cellmate of Hope Siegel, claimed that Siegel told her that Trease physically made her pull the trigger with his hand (Vol. XXVIII, TR 2642). Sterling added that Silkwood and Siegel had a falling out after December of 1995 (Vol. XXVIII, TR 2648). On cross-examination the witness indicated that she had very limited discussion with Siegel about the facts of the case, only one short conversation (Vol. XXVIII, TR 2649). There was no

reference to the throat being slashed and Siegel was emphatic that Trease was the controlling force in the homicide, and that everything she did was because Trease made her do it. Siegel never said she acted alone, nor did she mention a stun gun. Siegel said she was a victim herself. Sterling witnessed the animosity of Silkwood to Siegel (Vol. XXVIII, TR 2650-2652). It was apparent Silkwood hated her (Vol. XXVIII, TR 2652).

Dr. Cynthia Bailey, a neuropsychologist, testified that she interviewed and examined Hope Siegel on November 2, 1992 in relation to automobile accident injuries sustained September 20, 1992, and at that time Siegel was suffering from problems with temper control (Vol. XXVIII, TR 2673). She determined that her I.Q. was 82, the low average range of intellectual functioning and Siegel reported to her feeling depressed, stressed, anxious and difficulty in concentration since the accident (Vol. XXVIII, TR 2674). Bailey determined that Siegel was emotionally stable, empathetic and warm, had a reasonable control of her issues of anger and hostility and that her symptoms were consistent with post concussion syndrome (Vol. XXVIII, TR 2676).

PENALTY PHASE:

After the jury returned its guilty verdicts, at a hearing on December 13, 1996, defense counsel advised the court pursuant to Koon v. Dugger, 619 So.2d 246 (Fla. 1993), that Trease had instructed him not to present any type of evidence in mitigation

(Vol. XXX, TR 2829). The court made inquiry and Trease confirmed that he had refused to go to Jacksonville the day before for the PET scan arranged by defense counsel Mercurio (Vol. XXX, TR 2829). After referring to those present as "you stupid little assholes" Trease confirmed his desire not to have the examination and a desire not to be present during court that morning (Vol. XXX, TR 2830-31). As to the presentation of evidence appellant stated that "Mr. Mercurio can do what he deems necessary that he must do. . . ." (Vol. XXX, TR 2832). Trease allowed defense counsel to do what he wanted (Vol. XXX, TR 2832). He also indicated that he would be willing to undergo a PET scan if they could still get it scheduled (Vol. XXX, TR 2833).

At the penalty phase on December 16, 1996 it was announced that appellant refused to be present, against the advice of defense counsel (Vol. XXX, TR 2869-2870). The state introduced into evidence Exhibit 1 pertaining to appellant's armed robbery of Colleen Joy Harmon on November 19, 1972 (Vol. XXX, TR 2895-96). Edward Beran next testified regarding he and his family being victims of robbery and assault on January 7, 1981; see also Exhibit 2 (Vol. XXX, TR 2897-2902). During the episode, his wife and son were tied up, Trease told his accomplice to "shoot the motherfucker" and Beran received 53 stitches to his head after being pistol-whipped. A six hundred dollar necklace was taken

(Vol. XXX, TR 2899-2902). No one was shot but the incident affected him and his family afterward; Beran could not sleep for eleven days afterward and his son years later engaged in behavior (punching a wall) that those around him had never seen in him (Vol. XXX, TR 2902-03).

Karen Sherman testified that on October 27, 1981 she was robbed and beaten by an assailant demanding her diamond ring. Appellant's conviction, Exhibit 3, was introduced. The incident resulted in three surgeries, and another one scheduled and she sustained "a fear that you just never get over." (Vol. XXX, TR 2904-2909).

Defense witnesses corrections officer Robert Owen, Michael Davino, and Donald Corsi testified that Trease had not been a problem in jail while awaiting trial (Vol. XXX, TR 2911-2929). Owen and Corsi admitted they were unaware of appellant's nine violent felony convictions (Vol. XXX, TR 2919, 2929). Davino also testified that when another inmate had attempted suicide Trease hollered "inmate cut his wrist" (Vol. XXX, TR 2923), but other inmates had also screamed for help at that time (Vol. XXX, TR 2925).

A former neighbor Lorraine Mendyk from Saginaw, Michigan, lived next door to the Trease family from 1956 through 1959 (Vol. XXX, TR 2931). Appellant's father was never sober and she saw

signs of physical abuse on appellant and his sisters. The children were fed goulash while the parents ate steaks and pork chops (Vol. XXX, TR 2933-34). The witness hasn't seen or heard from appellant since 1962 (Vol. XXX, TR 2938).

During a break in testimony, trial defense counsel informed the court that he would not be calling either expert Dr. Merin, Dr. Wood or Dr. Negroski if the PET scan did not show organic brain injury (Vol. XXXI, TR 2948-49).

Carol Rutkowski, the forty-seven year old sister of appellant Trease, testified that their father passed away in 1972 from a heart attack (Vol. XXXI, TR 2956). She stated that he would make them take off their clothes and beat them with a strap. He always drank at home (Vol. XXXI, TR 2959, 2961). Additionally, he tried to sexually bother her in front of appellant and his sisters (Vol. XXXI, TR 2963). He would mock appellant and tried to make him go into his mother's bedroom (Vol. XXXI, TR 2964). They were not permitted to have friends when the father was at home (Vol. XXXI, TR 2965). There were a pair of boxing gloves at home to encourage appellant to fight (Vol. XXXI, TR 2966-67). Their father even made appellant and his sisters beat him (the father) with a belt and dog leash (Vol. XXXI, TR 2969). Appellant ran away in his teens and the witness claimed she was beaten the most (Vol. XXXI, TR 2973, 2975, 2986). Her sister Linda was sexually abused by their father

from age seven to fifteen or sixteen (Vol. XXXI, TR 2978). Her father once shot her mother in the arm (Vol. XXXI, TR 2979). The witness admitted on cross-examination that she has been able to hold a job, get married and raise a family and has never been involved in any kind of violent crime (Vol. XXXI, TR 2987).

Linda Peltier, appellant's forty-six year old sister, similarly described physical abuse by the father and stated she had been sexually abused (Vol. XXXI, TR 2989-97). She also had not subsequently been involved in any crimes (Vol. XXXI, TR 3010).

On December 19, 1996 defense counsel advised the court that the results of the PET scan were negative for organic brain damage and that there were no other witnesses. Counsel stated that Trease had refused permission to have his mother and daughter testify (Vol. XXXI, TR 3019). Earlier Carol Rutkowski had testified that appellant had a sixteen year old daughter Marisa and a photo of her was introduced into evidence (Vol. XXXI, TR 2981-82). Following argument the jury recommended death by a vote of eleven to one (Vol. XXXI, TR 3054).

On January 22, 1997 after further argument (Vol. XXXI, TR 3062-3085) the court recessed and returned and imposed a sentence of death (Vol. XXXI, TR 3086-3096).

After the filing of sentencing memoranda by the prosecutor

(Vol. XI, R 2011-2024) and the defense (Vol XI, 2025-2033)[2], the trial court entered its sentencing order, reciting at Vol XII, R 2235-2237:

AGGRAVATING FACTORS

1. The defendant was previously convicted of other felonies involving the use or threat of violence to the person.

On August 29, 1973, defendant was convicted of Armed Robbery in Milwaukee, Wisconsin. This conviction was for a crime committed on November 19, 1972, in which the defendant approached a motel desk clerk, pointed a gun at the clerk, and stole money.

On May 16, 1983, defendant was convicted of Robbery in Los Angeles, California. This conviction was for a crime committed on October 27, 1981, in which defendant beat a woman severely with his fists causing the victim serious bodily harm in order to facilitate the theft of her purse and rings.

On December 8, 1983, defendant was convicted of seven felonies: Burglary; Attempted Robbery (two counts); Robbery; and Assault With a Deadly Weapon (three counts). The convictions arose from an incident that occurred on January 7, 1981, in Orange County, California in which the defendant and two other persons, at gunpoint, burglarized a residence occupied by a man and woman and their son, tied up and gagged the woman and her son, and "pistol-whipped" the man, all to facilitate the theft of jewelry. The man was beaten so severely that he required more than fifty stitches to his head. Defendant and his accomplices stole a necklace from the woman.

[2]The defense memorandum acknowledged that the defense was unable to present any statutorily enumerated mitigating facts (Vol. XI, R 2030).

The existence of this aggravating factor was established beyond a reasonable doubt.

2. The capital felony was committed while the defendant was engaged in the commission of, or attempt to commit, a robbery or burglary.

The evidence established beyond a reasonable doubt that defendant was engaged in the burglary Paul Edenson's home, and the robbery of Mr. Edenson, when defendant killed Mr. Edenson. The jury found defendant guilty of both the Burglary and the Robbery.

The existence of this aggravating factor was established beyond a reasonable doubt.

3. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

Defendant and the victim knew one another. They had engaged in a business relationship immediately prior to the killing. The defendant, at the time of the crimes, was not concealed and made no attempt to conceal his identity from the victim. Defendant told his accomplice, HOPE SIEGEL, that he killed the victim in order to prevent his identification and because the victim had torn defendant's shirt.

The existence of this aggravating circumstance was established beyond a reasonable doubt. Furthermore, the evidence established that the dominant motive for the killing was the avoidance or prevention of arrest.

4. The capital felony was committed for pecuniary gain.

The existence of this aggravating factor was proven beyond a reasonable doubt; however,

the court is not considering this factor because the court has found to exist the circumstance that the capital felony was committed during the commission of a burglary and robbery.

5. The capital felony was especially heinous, atrocious and cruel.

Defendant beat the victim to the floor. Defendant had the victim lying face down on the floor and defendant was sitting on the victim. Defendant asked the victim more than once where the victim's safe was. When the victim failed to provide an answer that the defendant found satisfactory, defendant sent Hope Siegel to her truck to get a gun. The victim was thus aware that a gun was being obtained for defendant.

Defendant stuck the gun to the side of the victim's head and again asked the location of the victim's safe. He asked the victim several times "do you want to live?" The victim replied "yes".

Defendant shot the victim in the side of the head. The bullet exited above the victim's right eye. The victim did not die immediately after being shot. In fact, the victim tried to push himself up off the floor. Based on the testimony of the medical examiner, the victim was aware of the danger he was in and the further danger he faced.

The defendant did not shoot the victim a second time or otherwise attempt to effect the instantaneous death of the victim. Instead, while the victim was still alive (again based on the medical examiner's testimony and the facts as related by Hope Siegel), the defendant instructed Hope Siegel to get a Knife from the victim's kitchen. Hope Siegel got a knife from the kitchen and gave it to the defendant. The defendant used the knife to cut the victim's throat three times. Defendant used such force that a portion of the victim's hyoid bone was expelled from the

victim’s throat and landed several feet away from the victim’s body.

The victim survived this last insult for several minutes. Defendant told his accomplice, HOPE SIEGEL, that he had remained with the victim until he heard the victim’s last breath which he, the defendant, enjoyed.

The killing of Paul Edenson by this defendant was conscienceless, pitiless and unnecessarily torturous to the victim.

The existence of this aggravating factor was established beyond a reasonable doubt.

MITIGATING FACTORS

1. STATUTORY FACTORS.

No evidence was presented to establish statutory mitigating factors.

2. NON-STATUTORY FACTORS.

a. That defendant has adjusted well to incarceration and has conducted himself in an appropriate manner while in jail awaiting trial in this case. He assisted in the prevention of a fellow inmate’s suicide. I find this factor to have been established to exist by the greater weight of the evidence; however, I give it little or no weight.

b. Defendant was physically abused as a child and witnessed his sisters abused physically and sexually by their father. The abuse of both the defendant and his siblings occurred regularly. The instances of such abuse are too numerous to recount. The existence of this factor was proven by the greater weight of the evidence. No evidence was presented to relate this factor to defendant’s conduct in this case, or for that matter to any of the defendant’s prior instances of criminal behavior. Both of the sisters of defendant who testified related that they had not engaged in criminal behavior

during their lives. I give this factor considerable weight.

c. Hope Siegel received a vastly disparate sentence from that being sought for this defendant. Hope Siegel participated in the burglary and robbery. She did not shoot the victim or cut the victim's throat. She had no foreknowledge that defendant intended to kill Mr. Edenson. Her testimony was critical to the successful prosecution of the killer. The disparate sentence received by Ms. Siegel was justified. I give this factor little weight.

I have carefully considered and independently weighed the aggravating and mitigating circumstances which I have found to exist. I have given great weight to the recommendation of the jury. I concur with the jury's finding that the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist.

Trease now appeals.

SUMMARY OF THE ARGUMENT

I. The lower court did not err in denying a defense request for a second attorney to assist since trial counsel was very experienced in criminal cases and the credibility rationale advanced below is insubstantial. This Court has rejected similar requests. Armstrong v. State, 642 So.2d 730 (Fla. 1994); Ferrell v. State, 653 So.2d 367 (Fla. 1995).

II. The lower court did not abuse its discretion in refusing to appoint different counsel. The lower court carefully listened to the reasons propounded for appointing different counsel and properly concluded that they were meritless. Trial counsel Mercurio could and did provide capable, effective representation.

III. The trial court's ruling on the state's motion in limine #1 correctly followed the requirements of this Court's decision in Edwards v. State, 548 So.2d 656 (Fla. 1989), appellant acquiesced and agreed to the ruling and Trease was not prohibited from presenting a defense. The trial court properly allowed the prosecutor to introduce Hope Siegel's prior consistent statement made to Pennsylvania Trooper Harry Keffer on August 24 prior to her arrest or being charged with the Edenson murder since appellant opened the door on cross-examination by suggesting that her motives included favorable terms of a plea bargain, that she was not charged with certain offenses and that her agreement with the state

included testifying both truthfully and consistently with earlier statements.

IV. The lower did not err reversibly by permitting improperly the admission of evidence of other crimes. The trial court properly admitted testimony of the Shorin burglary since the gun used in the instant homicide was stolen in that burglary. Other challenged evidence was not Williams-rule evidence and was relevant for various issues at trial.

V. The trial court properly accorded only minimal weight to the non-statutory mitigating factor of helping to prevent another inmate's suicide.

VI. The lower court did not err in finding the aggravator of avoid arrest since the victim and appellant had done business together and appellant expressed to his cohort the motive to eliminate a witness who could identify him.

ARGUMENT

ISSUE I

WHETHER THE LOWER COURT ERRED REVERSIBLY IN DENYING A DEFENSE REQUEST FOR A SECOND ATTORNEY TO ASSIST.

Prior to trial appellant through his attorney Mr. Mercurio filed a motion to appoint co-counsel (Vol. I, R 58-59). At a hearing on November 15, 1995 on the motion, defense counsel indicated that the co-counsel he had in mind was David Denkin (Vol. XIII, TR 13). Counsel stated that the reason for the request was that the state indicated that it was seeking the death penalty (Vol. XIII, TR 14). The court responded, "That's why I appointed you because you're tremendously qualified, you have the ability, you've handled many of these cases. . ." (Vol. XIII, TR 14) and inquired whether there was any specialized knowledge that Mr. Denkin has that Mercurio didn't.[3] Mr. Mercurio responded:

> MR. MERCURIO: I wouldn't say that he has any specialized knowledge that I don't have or possess, or the ability to obtain or possess, but the primary reason for seeking two attorneys in death penalty cases is, first of all, that's one of the standards that the American Bar Association set for representation in death penalty cases. Secondly, it would allow --
>
> THE COURT: They don't pay the bill.
>
> MR. MERCURIO: I understand that.
>
> Secondly, it would allow Mr. Denkin to concentrate on the penalty phase and for me to

[3]The Florida Bar Journal lists Mr. Mercurio as Board Certified in Criminal Trial Law.

> concentrate on the guilt phase so that in the event this case were to go to trial that I would be able to maintain some degree of rapport with the jury and sincerity, if I have to make an argument that he's not guilty of the crime itself; and then Mr. Denkin can get up without having lost that credibility, if the jury has reached a verdict against him, and still maintain the credibility and deal with the issues in the penalty phase. That's one of the other factors. It's primarily related to that and the ability to spend a significant amount of time dealing with that issue.
>
> (Vol. XIII, TR 14-15)

Mercurio acknowledged that Florida case law did not articulate an entitlement to two attorneys and "I would be misrepresenting the law if I said that" (Vol. XIII, TR 18). The court repeated that the reason it had assigned Mr. Mercurio to this case was that with his reputation and experience "you're one of the most qualified people that we have in this circuit" (Vol. XIII, TR 18). The court added:

> THE COURT: That's what I figured, and I'm in agreement with that, not that we -- I understand the necessity to keep costs down, and, certainly, if it was necessary for his defense, I would do whatever to give him a defense equal to somebody who wasn't indigent. I would make an order for anything that I had to do.
>
> But, getting back to it, I think that the argument with regard to credibility, I think the jurors are sophisticated to understand that it's a two -- and we've explained to them that it's a two-phase thing: The first phase, they have to make a conclusion as to guilt. And I certainly don't think a lawyer loses any credibility, because he's not there putting forth his personal views, the lawyer is there

> arguing the facts to the jury, and so the lawyer's credibility, so to speak, is really not an issue. And I think the jurors are sophisticated enough to understand the difference between arguing the innocence or guilt as opposed to arguing the penalty phase.
>
> And I would think that it would be a tremendous -- it's almost unavoidable that there would be a tremendous duplication of hours because you would both have to be kept abreast of what happens, both lawyers would have to attend deposition, because some parts of it might deal with the guilt phase and some parts might deal with the penalty phase. And I've discussed this with other judges, and I think the trend is going to be that there's going to be one lawyer in a death penalty case.
>
> Now, I'll give you as much time as you need and whatever hours you have to put in to totally and completely prepare this case, I will see to it that you're paid for it, but I'm not going to appoint a co-counsel at this point, without prejudice to renew the motion if you could come up with some type of a real reason that -- not that this isn't real, but a real persuasive reason for it. So I'm denying your motion.
>
> MR. MERCURIO: Okay, I'll prepare an order for the Court, then.
>
> THE COURT: Okay.

(Vol. XIII, TR 19-20)

The motion was denied without prejudice, and subject to renewal at a later time (Vol. I, R 77).

The lower court did not abuse its discretion. This Court has repeatedly rejected the argument that there is entitlement to two attorneys in a capital case. In Armstrong v. State, 642 So.2d 730 (Fla. 1994) this Court stated:

> [11][12] In his final guilt-phase issue, Armstrong claims that his right to effective

> assistance of counsel and equal protection was violated because the trial judge refused to appoint two attorneys to represent him in this case. According to Armstrong, because of the complicated nature of this case, he was entitled to more than one attorney. We disagree. Appointment of multiple counsel to represent an indigent defendant is within the discretion of the trial judge and is based on a determination of the complexity of a given case and the attorney's effectiveness therein. Makemson v. Martin County, 491 So.2d 1109 (Fla.1986), cert. denied, 479 U.S. 1043, 107 S.Ct. 908, 93 L.Ed.2d 857 (1987). We note that, in making his request for co-counsel, Armstrong stated that additional counsel was needed to ensure that the case was properly investigated and to allow one counsel to represent him during the guilt phase and another to represent him during the penalty phase to guarantee a fair trial. In ruling on Armstrong's request, the trial judge specifically stated that another counsel was unnecessary and that Armstrong had been given "almost carte blanche " access to investigators to assist him. We find that the trial judge acted within his discretion in denying Armstrong's request.
>
> (text at 737)

Subsequently, in Ferrell v. State, 653 So.2d 367, 370 (Fla. 1995) this Court declared:

> [2][3] Ferrell's second claim is two-fold. The first part of this claim--that he was denied effective assistance of counsel and due process when the trial court refused defense counsel's request that co-counsel be appointed--is without merit based on our recent decision in Armstrong v. State, 642 So.2d 730 (Fla.1994). In that case, we explained that "[a]ppointment of multiple counsel to represent an indigent defendant is within the discretion of the trial court judge and is based on a determination of the complexity of a given case and the attorney's

> effectiveness therein." Id. at 737. Ferrell's attorney admitted during the motion hearing that his case was not complicated. (FN2) Clearly, there was no abuse of discretion here. We also decline Ferrell's invitation to adopt a rule that would require the appointment of two attorneys in all capital cases. The standard set forth in Armstrong adequately protects the rights of defendants in capital cases.

The reasons advanced below by the defense were insubstantial. The loss of credibility argument is not solved merely by having a second counsel, presumably less active in the guilt phase, becoming the primary actor at penalty phase since the jury would attribute the lack of success of the defense in the guilt phase to the entire defense team. Reliance on ABA standards may be a worthwhile guide but as Justice O'Connor observed for the Court in Strickland v. Washington, 466 U.S. 668, 688, 80 L.Ed.2d 674, 694 (1984) they are only guides and are not determinative of constitutional requirements.

The lower court did not abuse its discretion in following the dictates of this Court in Armstrong and Ferrell, *supra*, and in failing to anticipate or predict what some future Court somewhere might opine, especially given Mr. Mercurio's talent and experience.

ISSUE II

WHETHER THE COURT ERRED IN REFUSING TO APPOINT DIFFERENT COUNSEL.

Mr. Trease and his defense team did not enjoy the warmest relationship.

(1) The Hearing on September 18, 1996. (Vol. XIII, TR 62-93).

The court conducted a hearing on appellant's motion to dismiss court-appointed counsel Mercurio and to appoint Ben King (or Roy Black or Deborah Blue). Trease informed the court that he did not have the ability to hire a lawyer to represent him (Vol. XIII, TR 63). Trease complained that his lawyer stated he would work harder if he felt his client were innocent and that his mitigation specialist told his sister that she felt Trease would be found guilty (Vol. XIII, TR 64). Appellant thought counsel should request a change of venue (Vol. XIII, TR 67)[4] and that counsel had relayed a prosecutor's offer of life imprisonment which Trease did not want (Vol. XIII, TR 68). Appellant didn't feel comfortable with Mr. Mercurio or his mitigation team (Vol. XIII, TR 69). Appellant answered in the affirmative the court's inquiry that a major disagreement was counsel's expression that Trease may be found guilty and sentenced to death (Vol. XIII, TR 70). Trease mentioned that he had written to the Florida Bar and appellant

[4]At the subsequent pretrial hearing on November 22, 1996, defense counsel informed the court that despite prior exclamations Trease "has instructed me not to pursue a change of venue at this point." (Vol. XIV, TR 347).

urged that there had to be a conflict of interest (Vol. XIII, TR 74). He complained that a handwriting expert to show he was left-handed hadn't yet done anything (Vol. XIII, TR 74) and that counsel hadn't interviewed people at the county jail (Vol. XIII, TR 75).

Mr. Mercurio responded:

> MR. MERCURIO: Judge, I think that statement was taken out of context in the conversation that we had. It was one of the first conversations I had when I first was meeting Mr. Trease, he mentioned having read something in a book about it, and I think what I told him was that I've never had to worry about what my personal beliefs about a case were, that I know that there are some attorneys that that may cause problems with but for me personally, my personal belief as to someone's guilt or innocence was not relevant as to how hard I worked.
>
> Now, with respect to the issue of some cases he posed, some questions about if I knew a person was 100 percent innocent would I work harder and if I had evidence of it, and I said that might cause me to work a little harder if I had 100 percent evidence that a person was innocent, or not guilty, that that might cause me to work harder, but that was a general conversation about what type of impression or comment I would make on some statement he read in the book. So that's my response with respect to that.

(Vol. XIII, TR 76).

* * *

> THE COURT: I don't want to – this is kind of a precarious topic matter, of course, but, to your knowledge, have you conveyed any confidential communications to anyone other than persons who work for you in this case without Mr. Trease's knowledge and consent?

MR. MERCURIO: No, sir. I mean, I've never breached the attorney/client relationship and I've never communicated to anyone without his permission and consent.

And I brought Ms. Pettry here, who's present in the courtroom.

(Vol. XIII, TR 77).

Judge, what this all started was, there was a conversation between myself and Mr. Roberts, or several conversations, where the discussion of a potential plea was brought up, and Mr. Roberts and Mr. Nales had suggested to me that if there was going to be a plea in this case and if Mr. Trease were willing to plead guilty to the first-degree murder they would consider waiving the death penalty and that this had to be done on or before September 1st, 1996. Ms. Pettry's been working with me side by side investigating the penalty phase of this case. Mr. Steele has been the private investigator assigned to the case.

So during the month of August, after Ms. Pettry had returned from conducting some penalty phase investigation in Mr. Trease's home state where some of his family members were, I spoke to Mr. Trease personally, conveyed the possibility of this offer to him. I wanted to make sure, for the purposes of protecting myself and the record, for 3.850 reasons and other ethical concerns, that I had someone else there with me.

And since Ms. Pettry and Ms. Pepper were assigned to assist me with the mitigation, we had a meeting on a Friday afternoon, and I don't recall if it was the weekend before Labor Day or not, but there was a Friday afternoon meeting where we basically went over all the evidence in the case, which included the fact that none of the DNA matched with Mr. Trease, that there was no DNA found at the scene of the crime, which includes jailhouse statements, people that were in the cell of the codefendant, Hope Siegel, who was the one who implicates Mr. Trease in this murder, where they say Hope admits she did the murder

alone without Mr. Trease's help and other things.

And we discussed at length with him the possibility that if he were to be found guilty by a jury that he was a good candidate, based on what we know at the time, to be sentenced to death in the electric chair, based on what we know of the aggravating and mitigating circumstance that we could legally present to the Court.

So after that, it's my understanding that Ms. Pettry had a conversation with Mr. Trease's sister, and all of a sudden that's when this complaint started, that's when we were continuing to work on the case and Mr. Trease refused to see Ms. Pettry and refused to cooperate with us in the remaining portions of the defense.

Then out of the blue I get the motion to dismiss me as counsel. I then received from the Florida Bar a letter from the attorney that included a copy of a complaint written by Mr. Trease. And the letter from the attorney from the Florida Bar basically said that they had reviewed Mr. Trease's complaint and found it to be without merit, that I'm entitled to my opinions, that nothing I did was improper or violated the rules of professional responsibility. I have not seen this second letter that he's made reference to or that the Court made reference to, so as far as I knew any Bar or grievance matter had been resolved by virtue of that being the case.

With respect to the other issues, I don't know if the Court wants me to go into them all or not, but I'll gladly do it.

(Vol. XIII, TR 78-80).

* * *

THE COURT: He's also indicated that he asked you to get him a –- move, I'm sorry, move for a change of venue.

MR. MERCURIO: He did request –- probably the very first thing when I first met Mr. Trease, that was the first words out of his mouth, that he wanted a change of venue

because there was no way he could get a fair trial in Sarasota County based on the extreme amount of publicity.

What I told Mr. Trease was that prior to trial we would move for a change of venue and that, in my experience, based on the activities that have occurred in the 12th Judicial Circuit and the current state of the case law, that in all likelihood this Court would require us to attempt to pick a jury and see to what extent a potential jury veniring has been exposed to the publicity relating to this case and reserve ruling on the issue of changing venue. He didn't like that answer, he's never like that answer, he wanted me to file the motion for a change of venue, and I explained the manner in which I would do that to him and have continued to explain it that way. So that's with respect to the motion for change of venue, that's what I have told him.

The burglary charge, he mentioned talking about the burglary charge, and what –- the discussion I had with him was basically to the extent that he had been charged with a burglary, the State had filed a notice of intent to use similar-fact evidence of that burglary charge in the first-degree murder case, however, if he were to resolve the case by way of a plea to the first-degree murder case that the burglary charge in all likelihood would disappear, meaning, in my mind, that it would be some type of a concurrent sentence. And then, as he's indicated, there was a case management conference after that and the case was set for trial.

So I didn't deceive him in some fashion. I never told him the case had been dismissed or in any way, shape or form disappeared, other than to suggest to him that if he pled guilty that that was the lesser of his two worries and that would resolve itself by way of a plea to the murder case if that was something he chose.

I think, quite frankly, Your Honor, the problem with Mr. Trease and myself at this point is not one of real questioning the things we've done, it's one of not having

liked what he was told, and that's the unfortunate problem when you deal with cases of this significance of a first-degree murder where death is a possible penalty.

I've done my best in representing clients throughout the 12-plus years I've done this and the number of death penalty cases I've had to always be as honest and open with clients as I can. I've told him –- and he's even admitted during his statement that he feels I've been honest with him all along. What I've told him is that, in my assessment of the case, if he were to be found guilty of the felony murder there is a substantial likelihood, based on the aggravating and mitigating factors that I'm aware of, that a jury would recommend the death penalty. That does not, however, mean that I will try any less hard or to do my best to give Mr. Trease the fairest possible trial I can and would continue to do so.

As I've said earlier, Your Honor, Ms. Pettry is present in the courtroom. If the Court wishes to hear from her, she's certainly able and willing to do so.

(Vol. XIII, TR 82-84).

Mitigation specialist Cheryl Pettry testified under oath:

THE COURT: He indicates in his –- and I assume you've read –-

MS. PETTRY: Yeah.

THE COURT: –- this, that you spoke with his sister, I believe he said, yes, his sister, and expressed an opinion that he was guilty. Do you know what it is he's referring to?

MS. PETTRY: Yeah, I do. He asked his sister to call me one day after this meeting, and as I have told him and I tell everyone, and I'm sure you know, a mitigation specialist really doesn't care whether somebody's guilty or innocent. We still have to do the same amount of work and prepare for the eventuality or the possibility that we will be going into a mitigation phase. What I said to his sister Linda after that meeting that Friday was,

Linda, it is my opinion that if he is found guilty he will receive the death penalty because the State has numerous aggravating witnesses that are witnesses that are going to be coming to demonstrate there's some aggravating circumstances in his life.

THE COURT: Did you at any point communicate or have you communicated to her or to any other person other than Mr. Trease, Mr. Mercurio, or other people working with you or on Mr. Trease's behalf in this case any communication you made to your or Mr. Mercurio in confidence by Mr. Trease.

MS. PETTRY: No.

THE COURT: So this was just an expression of your opinion that if he were found guilty of murder that he would be sentenced to death.

MS. PETTRY: The gist of the conversation was, Why did you go ask my brother to take a plea? Well, number one, we didn't go ask him to take a plea. We wanted to demonstrate to him --

THE COURT: Excuse me, Mr. Trease, I listened to you, I was very patient, I heard you out, and now you're going to let me listen to her.

Okay, you go ahead.

MS. PETTRY: We went to discuss a possible plea bargain with Mr. Trease, and at that point I said to Mr. Trease, if you are found guilty of this crime, and I don't care whether he did it or not, I honestly believe that you will end up with the death penalty, and that's all I have ever said to anyone.

THE COURT: All right. Anything else, Mr. Mercurio.

MR. MERCURIO: Judge, my only request is that if the Court not grant Mr. Trease's request to dismiss me as his counsel and the mitigation specialist that the Court do whatever it can or whatever is within its power to suggest to Mr. Trease that it would remain in his best interest to continue to cooperate with us, because since the time he's done this Ms. Pettry has attempted to go see him at the jail and he's refused to see her and communicate with her. So if we are to remain on the case, I think it's imperative

> that Mr. Trease realize that he has to continue to cooperate with us to whatever extent we request his cooperation, otherwise, certainly it would be difficult for us to continue to effectively represent his interests.
>
> (Vol. XIII, TR 85-87).

The court found that attorney Mr. Mercurio was guilty of no impropriety either ethically or in terms of effective assistance and denied the motion to discharge (Vol. XIII, TR 89-90). The court inquired whether Trease wished to invoke the right to self-representation and appellant answered that he did not (Vol. XIII, TR 91). The court entered a written order following this hearing (Vol. II, R 367-370).

(2) <u>The Hearing on October 7, 1996</u>. (Vol. XIII, TR 94-112).

The court held a hearing on appellant's second motion to dismiss Mr. Mercurio, on the claim that counsel had made statements on an elevator expressing a belief in appellant's guilt (Vol. XIII, TR 96) and attorney Mercurio's motion to withdraw (Vol. XIII, TR 99).

As to Mercurio's motion, counsel stated that Trease had filed two complaints with the Florida Bar against him (both of which were denied by staff counsel), that Trease had previously filed a motion to dismiss him as counsel and the very next day granted an interview to the television media contrary to his advice, and then Trease filed a motion to dismiss him on the accusation of making statements to a sheriff's deputy (Vol. XIII, TR 99-100).

When the court inquired how he had been hampered in the preparation of a defense Mercurio responded that it would call for him to disclose attorney-client communications which should be done in an ex parte proceeding without the prosecutor's presence (Vol. XIII, TR 102).

The court turned to Trease's motion. Corrections Officer James Clay testified that he overheard a conversation in a jail elevator in which Mercurio stated that he did not believe that many of his clients were innocent; he felt that most of them were guilty (Vol. XIII, TR 104). Mercurio did not say Trease was guilty. (Vol. XIII, TR 105). Mercurio denied making any statements like that in the elevator on the way up to see Mr. Trease and whatever the officer thought he heard any comment was not directed to Mr. Trease (Vol. XIII, TR 109). The trial court denied the motion, noting that the officer's testimony did not recall anything specific with regard to Mr. Trease (Vol. XIII, TR 109).

The court then reminded appellant that Trease had an option of self-representation but that the court was not obligated to appoint successor counsel, or if Trease could hire another lawyer he could do so. (Vol. XIII, TR 109-110). Trease chose not to represent himself (Vol. XIII, TR 110).

The court then conducted an in camera interview with attorney Mercurio and appellant Trease in the absence of the prosecutor (Vol. II, R 303-309). The court asked Mercurio what reason he had

to believe he could not effectively represent appellant. Mercurio responded as to Trease's uncooperativeness; that appellant claimed to know who committed the crime but wouldn't tell him. Mercurio claimed Trease wanted counsel to pursue Trease's theory but refused to disclose the people to present to the jury as to their guilt or innocence to clear him. Also, Trease wanted counsel to take an approach that counsel thought would not be at all effective and for which counsel was uncomfortable. As to penalty phase, counsel claimed that Trease had told him things that he should or should not attempt to present in court (Vol. II, R 304-305). Mercurio added that competency of counsel was not the issue and he didn't understand why appellant was taking this approach with him. Mercurio had been doing this work for over twelve years and felt that he was one of the more competent attorneys in the area (Vol. II, R 306). Mercurio agreed with the trial court's summary that it was not that Mercurio did not believe he could effectively represent Trease, only that he could not effectively do so in the manner he deemed to be his best interests (because of Trease's conduct, e.g., disregarding counsel's advice and giving newspaper interviews)(Vol. II, R 306-307).

Trease responded that he didn't want to get life in prison and he thought that if counsel were offering life they must feel he's going to be found guilty and Trease agreed that he shouldn't have given the television interview (Vol. II, R 307). The court

explained that Mercurio did not say he would not pursue Trease's course of defense but believed it was the wrong course (Vol. II, R 308).

Back in open court, the court found that it could not be shown Mercurio has not acted and would not be able to act as effective counsel for Trease and denied the motion to withdraw and the motion for discharge (Vol. XIII, TR 111-112).

(3) The Hearing on October 10, 1996. (Vol. XIII, TR 114-124).

At this hearing, defense counsel Mercurio represented that Trease had made remarks to mitigation specialist Cheryl Pettry regarding a desire for self-representation (Vol. XIII, TR 116). The court interpreted the request as a motion for emergency Nelson inquiry. Trease responded that at one point he considered self-representation but now he did not –- "I would be –- have a fool for a client if I did" (Vol. XIII, TR 116-117).

The court then reviewed motions provided by Trease and stated that he had previously conducted Nelson inquiries and nothing new was raised in these motions (Vol. XIII, TR 117-119). Trease inquired whether he could appeal the trial court's earlier rulings on the motion to withdraw and to dismiss counsel (Vol. XIII, TR 119). Mercurio explained that he had informed Trease that he could not at this point in time appeal that ruling but could do so later in the event he were found guilty (Vol. XIII, TR 120). Trease indicated a desire to appeal the trial court's ruling (Vol. XIII,

TR 122). The Second District Court of Appeal dismissed Trease's appeal for lack of jurisdiction on January 2, 1997 (Vol. IV, R 679); Trease v. State, 686 So.2d 593 (Fla. 2DCA 1997).

(4) The Hearing on October 31, 1996. (Vol. XIII, TR 125-148).

At a hearing on October 31 one of the matters considered was a motion for court inquiry pursuant to Koon v. Dugger, 619 So.2d 246 (Fla. 1993) by attorney Mercurio (Vol. III, R 451-453; Vol XIII, TR 131-148). Mercurio represented that Trease had advised him not to present any mitigation whatsoever (Vol. XIII, TR 131). Counsel represented that he had developed mitigation evidence and discussed it with Trease (Vol. XIII, TR 133). Trease confirmed to the court that Mercurio had discussed the mitigating evidence with him and responded:

> Well, your Honor, he can present anything except for anything that has to do with my family. I'm not going to subject my family to this charade.
>
> (Vol. XIII, TR 133).

The court informed Trease of the importance of mitigation evidence to the jury and appellant understood (Vol. XIII, TR 134-135). Mercurio added that Trease had instructed him not to present anything but today he had changed him mind and restricted the presentation of mitigating evidence from any family members and appellant concurred (Vol. XIII, TR 135). Defense counsel represented that in his view the testimony and evidence from family members would be the most critical evidence to present in the

mitigation phase if the case went that far (Vol. XIII, TR 137).

At the prosecutor's request and without defense objection the court made inquiry of appellant as to his level of education, the absence of any disabilities. Trease related that he had never been treated for mental illness or disease and took only sleeping pills (Vol. XIII, TR 139). Trease asserted that he was fully alert, had not used alcohol or drugs and has not been sick in the last seventy-two hours (Vol. XIII, TR 140-141).

Mercurio further asserted that Trease did not even want family members in court (Vol. XIII, TR 141).

Mercurio then stated that Trease had another motion to dismiss counsel pertaining to events that day in the jail with Ms. Pettry and counsel (Vol. XIII, TR 143) but after conferring with Trease the latter had decided he did not wish to pursue it. The court responded that if he decided to do so, send the motion and the court would hear it (Vol. XIII, TR 144).

Legal Discussion:

There is no constitutional right to a "meaningful" relationship with counsel. Morris v. Slappy, 461 U.S. 1, 14, 103 S.Ct. 1610, 1617, 75 L.Ed.2d 610, 621 (1983). An indigent defendant does not have a right to have a particular lawyer represent him. Koon v. State, 513 So.2d 1253, 1255 (Fla. 1987).

Although it is true that apparently a great deal of counsel's and the trial court's time leading up to trial was consumed by

appellant's multiple assertions of dissatisfaction, the record demonstrates that the lower court did not abuse its discretion in denying motions to withdraw or to discharge court-appointed counsel. Sanborn v. State, 474 So.2d 309, 314 (Fla. 3DCA 1985).

Trease asserts that substantial deterioration of the attorney/client relationship can result in a situation where counsel cannot give effective aid in the presentation of a defense. Whatever validity that may have as a general proposition, the instant record shows that counsel was able to conduct a defense despite having a difficult and uncooperative client. As noted at the hearing on October 7, 1996 (Vol. II, R 303-309), it was not a situation that counsel Mercurio believed he could not effectively represent appellant but that the client's conduct in disregarding his advice made it difficult to effectively represent him in the manner counsel felt appropriate (Vol. II, R 307).

Despite the usual disagreements defense counsel frequently encounter with their clients, defense attorney Mercurio was able to mount a capable defense, both in challenging the prosecution's witnesses and affirmatively presenting defense witnesses Rebecca Bostic, Janene Silkwood, Tonya Sterling and Dr. Cynthia Bailey and for penalty phase using corrections officers, Michigan neighbor Lorraine Mendyk and appellant's two sisters, Carol Rutkowski and Linda Peltier.

With respect to the conflict of interest assertion, appellant

contends that the remark on the elevator overheard by Officer Clay created an actual conflict of interest adversely affecting performance. Appellee disagrees. Clay said he heard Mercurio mention that he felt most of his clients were guilty –- he did not say Trease was guilty. Mercurio denied making any such statement and whatever the officer thought he heard was not directed to Trease (Vol. XIII, TR 104-109). Additionally, attorney Mercurio had maintained that appellant earlier had misunderstood or taken out of context their earlier conversation. Whatever may be the approach of other defense lawyers

> . . . but for me personally, my personal belief as to someone's guilt or innocence was not relevant as to how hard I worked.

(Vol. XIII, TR 76).

The comment about working harder if there were 100% evidence of innocence related to a comment or impression on a statement Trease had read in a book (Vol. XIII, TR 76). Mr. Mercurio added:

> What I've told him is that, in my assessment of the case, if he were to be found guilty of the felony murder there is a substantial likelihood, based on the aggravating and mitigating factors that I'm aware of, that a jury would recommend the death penalty. <u>That does not, however, mean that I will try any less hard or to do my best to give Mr. Trease the fairest possible trial I can and would continue to do so.</u>

(emphasis supplied)(Vol. XIII, TR 84).

Appellee disagrees that there was any disintegration of the attorney-client relationship. The minor disagreements or

misunderstandings on pre-trial preparation were aired at the hearings before the trial court who concluded, on the matters presented to it, that counsel was not ineffective and could continue to capably represent Mr. Trease. And even though Trease at the Koon hearing on October 31, 1996, first opted to exclude the use of family members as mitigation witnesses in the penalty phase

> . . . he can present anything except for anything that has to do with my family. I'm not going to subject my family to his charade.
>
> (Vol. XIII, TR 133)

by the time the penalty phase was actually conducted trial counsel succeeded in persuading appellant to allow the use of his sisters Ms. Rutkowski and Ms. Peltier to provide family background testimony (Vol. XXX, TR 2832).

The trial court was extremely thorough in its inquiries below to determine whether there was any legitimate basis for discharge of court-appointed counsel because of alleged incompetence. See Bowden v. State, 588 So.2d 225, 229-230 (Fla. 1991); Hunt v. State, 613 So.2d 893, 899 (Fla. 1992); Watts v. State, 593 So.2d 198, 203 (Fla. 1992); Toney Deron Davis v. State, ___ So.2d ___, 22 Florida Law Weekly S701, 702 (Fla. 1997)["As a practical matter, a trial judge's inquiry can be only as specific and meaningful as the defendant's complaint" citing Lowe v. State, 650 So.2d 969, 975 (Fla. 1994)]; Larzelere v. State, 676 So.2d 394, 403 (Fla. 1996).

Appellant's claim is without merit.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN THE ADMISSION OF THE TESTIMONY AND PRIOR CONSISTENT STATEMENTS OF THE CO-DEFENDANT HOPE SIEGEL.

(a) Whether the Trial Court's Order Granting State's Motion in Limine (#1) Prohibited the Defense from Presenting a Defense:

Perhaps the most significant factor demonstrating the falsity of appellate defense counsel's current argument is the absence of any claim by the defense at trial that they were prohibited from presenting a defense; and certainly, trial counsel would have argued such had it been the case. It is true that the prosecutor filed motion in limine #1 to prevent testimony:

> 1) That Hope Siegel worked as a lingerie model;
> 2) That Hope Siegel's employment involved occasional sexual activity with customers;
> 3) That Hope Siegel received payment for this modeling and occasional sexual activity;
> 4) That Hope Siegel used or ingested any controlled substances, other than the time period immediately surrounding the homicide;
> 5) That in the past, Hope Siegel had been hospitalized as a result of controlled substance ingestion.
> 6) That in July, 1995, Hope Siegel was "Baker Acted" because it was believed she was suicidal.
> 7) That Hope Siegel has been involved in any criminal activity not resulting in a conviction, other than those crimes related to the homicide and those crimes committed with Robert Trease which the court finds admissible pursuant to F.S. 90.404.
>
> (Vol. III, R. 509-510).

At a pretrial hearing on November 22, 1996 (Vol. XIV, TR. 258-

272) after hearing argument that as to paragraphs one, two, and three that case law did not permit attack on the character of a witness by showing prior bad acts that had no bearing on credibility, the court agreed (Vol. XIV, TR. 262-263). The court also agreed regarding paragraphs 4-6 that it would follow the dictates of this Court's decision in Edwards v. State, 548 So.2d 656, 658 (Fla. 1989)(Vol. XIV, TR. 268). The lower court stated:

> . . . the evidence of Miss Siegel's drug use I will be excluding for purposes of impeachment unless it can [sic] shown that Miss Siegel had been using drugs at or about the time of the incident, which is the subject of this lawsuit, this prosecution, unless it can be shown that the witness was using drugs at or about the time of her testimony at trial, or, all of this is in the disjunctive, or it is expressly shown by other relevant evidence that prior drug use -- that her prior drug use affects her ability to observe, remember and recount.
>
> That case specifically requires that there be something more than just her testimony that she previously used drugs or previously had hallucinations and so forth. I interpret that to mean that there has to be some other relevant evidence that would tend to show that essentially affects her ability to accurately recall and so forth.

(emphasis supplied)(Vol. XIV, TR. 266-267).

As to paragraph seven of the motion, the prosecutor related that he included that as a precaution for something he did not expect to come up. Apparently Siegel at deposition mentioned minor offenses for which she had not been arrested or convicted and the prosecutor did not want these matters introduced unless the court

found them to be admissible and relevant (Vol. XIV, TR. 268-269). The defense indicated that it might cross-examine on her stealing purses to get money to buy drugs to show Siegel could act on her own, not under Trease's domination (Vol. XIV, TR. 269). The court indicated that it could not make a pretrial ruling -- it did not think that the witness was a thief was sufficiently relevant other than showing she was a bad person. The court stated that it would allow the defense the opportunity to approach the bench and discuss it outside the presence of the jury for the court to make a ruling. The defense agreed this was "fine" (Vol. XIV, TR. 271-272; see also Vol. IV, R. 658).

After jury selection and prior to opening statements on December 2, 1996, the trial court entered its written order on the state's motion (Vol. IV, R. 708) and defense counsel announced that he had no objection on review of this order (Vol. XXII, TR 1415). In essence that order provided that the matters urged in the motion not be mentioned "without first proffering said testimony outside the presence of the jury" (Vol. IV, R. 708). Trial counsel's acquiescence and agreement with the court's ruling constitutes a procedural bar to now asserting error. See Lucas v. State, 376 So.2d 1149, 1151 (Fla. 1979)(This Court will not indulge in the presumption that the trial judge would have made an erroneous ruling had an objection been made and authorities cited contrary to his understanding of the law); Hazen v. State, 700 So.2d 1207, 1211

(Fla. 1997); Lindsey v. State, 636 So.2d 1327, 1328 (Fla. 1994); Correll v. State, 523 So.2d 562, 566 (Fla. 1988). The defense in essence acquiesced and concurred with the trial court's determination that Edwards constituted the applicable law and that the trial court was correctly applying it. Not only did trial counsel fail to avail himself of the opportunity -- as the trial court's order provided and as counsel well understood since he agreed to it -- to revisit the issue on a proffer where appropriate, but also defense counsel made abundantly clear that tactically he did not want Hope Siegel talking about Trease's criminal record or history before he even began his cross-examination of her (Vol. XXIII, TR. 1745-1746). Appellant declares at page 45 of the brief that "During this time period she willingly committed burglaries with Mr. Trease to obtain money for drugs. (Vol.6, C1105-1109,1115-1116)". But this is exactly what trial counsel explicitly warned the court -- prior to his initiation of cross-examination -- that he did not want Siegel to volunteer lest he have to request a mistrial. Appellant notes that in her deposition Hope Siegel acknowledged having worked as a lingerie model and for an escort service and that she occasionally performed sexual acts for cash. She additionally testified -- which remains unmentioned in appellant's brief -- that appellant Trease had her put an ad in the paper for her own escort service Luscious Lucinda (Vol. VI, R 1026). The business which could include engaging in

sexual activity or dancing while a person masturbated was Trease's idea (Vol. VI, R 1038). Obviously, if trial counsel had opted for the strategy current counsel second-guesses about, it could have opened the door to more damaging evidence about appellant which competent counsel could seek to avoid. (In her deposition Siegel claimed she bought drugs because appellant wanted her to get it; Trease did not threaten her -- Vol. VI, R 1083).

The contention that the trial court prevented the defense from presenting its defense -- especially with regard to Hope Siegel -- is frivolous.[5] An examination of the trial testimony of Hope Siegel (Vol. XXIII, TR. 1603-1839) reveals that during her direct testimony the defense objected about a dozen times (Vol. XXIII, TR. 1620, 1623-1624, 1629, 1644, 1647, 1667, 1726-1728, 1733, 1735-1736, 1738), most of which were sustained. The defense cross-examination of Ms. Siegel reveals no preclusion by the court of the

[5]At page 45 of his brief appellant impermissibly relies on excerpts of a deposition from Don Lambert. A pre-trial discovery deposition is not admissible at trial as substantive evidence. State v. Basiliere, 353 So.2d 820 (Fla. 1978); State v. Clark, 614 So.2d 453 (Fla. 1992). Appellant did not attempt to call Lambert as a witness at trial and the record does not provide any information to support a suggestion that the trial court refused to allow Lambert to be called or whether he had proper, relevant, and admissible testimony for use at trial. If we are now to speculate on why defense counsel did not call Lambert as a defense witness (whom the trial court did not prohibit) perhaps counsel felt it inappropriate to rely on a witness with two prior felony convictions (one involving a scheme to defraud)(Vol. VII, R. 1280-1281); who never saw Hope Siegel with cocaine (Vol. VII, R. 1308); who was still in love with Hope Siegel and had seen her many times in the county jail (Vol. VII, R. 1344-1345) and whom Hope had told she went along in the Edenson matter strictly to rob but not anything else (Vol. VII, R. 1350).

defense effort to present a defense (Vol. XXIII, TR. 1747-1818). On this record it would appear that trial counsel, having concurred with the propriety of the lower court's disposition of the pre-trial motion, was satisfied that he could satisfactorily impeach the witness without resort to revisiting the issue on a proffer, as he agreed. At the very least the defense could have asked the court to revisit the issue during the trial if it felt the court had misinterpreted the law or was otherwise denying them the opportunity to present a defense.

The defense cross-examination of Siegel at trial explored the witness' prior auto accident and resulting effects on her (Vol. XXIII, TR. 1749-1751), the on-again, off-again relationship she had with Trease and intervening dating with Shorin (Vol. XXIII, TR. 1752-1767). She was asked about taking Vicodin and Valium (Vol. XXIII, TR. 1767-1768), and taking a drink that day (Vol. XXIII, TR. 1770) and smoking marijuana with Edenson (Vol. XXIII, TR. 1774) her visit to the Edenson house on August 17 while Trease waited for her at Cha Cha Coconuts and arguing with him prior to the return to the Edenson residence, followed by Mr. Trease (Vol. XXIII, TR. 1774-1782), Trease's physical assault on the victim, the shooting, throat slashing by Trease and theft of the jewelry box (Vol. XXIII, TR. 1790-1794), the trip to Pennsylvania and the reasons for not revealing events on the way (Vol. XXIII, TR. 1796-1798), her conversations with Pennsylvania and Sarasota officers, her being

charged with murder, incarceration in the county jail and alleged conversations with Tonya Sterling and Janene Silkwood and plea bargain with the state (Vol. XXIII, TR. 1800-1818).

Appellant contends that in her deposition testimony Hope Siegel displayed "ample motive of her own to kill Paul Edenson" (Brief, p. 44). Appellee asks where? That Ms. Siegel previously had been a lingerie model or danced for men or at some point in her life had used drugs hardly suggests a motive to kill Mr. Edenson whom she had only met as a result of Trease's efforts. It is true that the defense presented to the jury the thesis that Siegel rather than Trease committed the Edenson homicide, a pathetic hypothesis that involves speculation that Siegel received unwanted sexual advances from Edenson, left his premises only to become enraged at Trease flirting with the two Brazilian women and returned to Edenson's home -- and in a jealous rage shot Edenson with the Glock Trease was found in possession of in Pennsylvania and slashed Edenson's throat in a manner -- according to the medical examiner with great force in a right to left manner with such force as to eject tissue from the hyoid bone feet away from the body (Trease was left-handed and proficient in the martial arts) -- all while the hapless Trease apparently waited unknowingly outside.[6]

The trial court correctly ruled that this Court's decision in

[6]There is no need to mention Trease's volunteered comment at sentencing that this was a mob hit (Vol. XXXI, TR. 3085).

Edwards, *supra*, limiting the introduction of evidence of drug use for the purpose of impeachment to the three exceptions cited therein. Accord, Green v. State, 688 So.2d 301, 305 (Fla. 1996)(no showing that defense witness was using the intoxicant at or about the time of the incident, or the time of testimony, or that prior use of the intoxicant affected the witness' ability to observe, remember and recount); Tullis v. State, 556 So.2d 1165 (Fla. 3DCA 1990) (delusions of witness were not contemporaneous with either the jail cell conversations or the witness' testimony); Richardson v. State, 561 So.2d 18 (Fla. 5DCA 1990); Johnson v. State, 565 So.2d 879 (Fla. 5DCA 1990); Williams v. State, 617 So.2d 398 (Fla. 3DCA 1993). To the extent that appellant may now be arguing that the lower court erred in obeying Edwards and its progeny, appellee disagrees with him and the lower court correctly followed the law.

Appellant contends in this Court that the trial court misapplied the correct standard. As mentioned, *supra*, trial counsel acquiesced and agreed to the lower court's pre-trial ruling. At the beginning of his cross-examination he sought the court's help to insure Siegel not volunteer testimony about Trease's criminal history and certainly would not want to emphasize Trease's dominating role in having Siegel buy drugs for his benefit (Vol. VI, R. 1052, 1083).

Appellant's contention that Siegel's deposition acknowledged recent use of cocaine is answered by the fact that the trial court

answered counsel's inquiry that Edwards and his ruling would permit exploration if used at or about the time of the incident:

> MR. MERCURIO: Judge, before we go and leave that area, I mean there is testimony from Miss Siegel, I believe, undoubtedly, she will admit that on the date of the incident she was taking, at a minimum, Vicodin and Valium.
>
> She also testified that at or about the time of this incident, her and Mr. Trease were involved in some type of three-day cycles of drug usage involving rock cocaine, Vicodin and Valium on a daily basis as well as alcohol.
>
> So are you saying that I can get into that?
>
> THE COURT: What I'm specifically doing is adopting as part of my order the Supreme Court's ruling at the middle of the left-hand column of page 658.
>
> Unless it can be shown that the witness had been using drugs at or about the time of the incident which is the subject of the witness' testimony; it can be shown that the witness is using drugs at or about the time the testimony itself; or it is expressly shown by other relevant evidence that the prior drug use affects the witness' ability to observe, remember, and recount.
>
> I think that that specifically addresses any drug use that she may have been engaging in at or about the time of the alleged robbery and homicide and so forth. Okay?
>
> MR. ROBERTS: Yes, Your Honor.
>
> MR. MERCURIO: Yes, sir.

(Vol. XIV, TR 267-268).

Appellant's contention that the lower court misapplied the Edwards standard is erroneous. Since the lower court announced it was following Edwards it presumably was aware that the trial court in Edwards -- whose actions were approved by the Fourth District Court of Appeal and this Court -- had permitted counsel to question

the victim about the drug use on the days preceding the incident and the night of the incident. 548 So.2d at 656. The trial court had answered defense counsel's inquiry about examining the witness concerning drug use at or about the time of the incident (Vol. XIV, TR 267-268). Defense counsel properly chose to confine his examination within the parameters of the court's correct ruling.

(b) <u>The Prior Consistent Statement</u>:

In the defense cross-examination of Hope Siegel counsel elicited from the witness that "jail was not a nice place to be" (Vol. XXIII, TR. 1748), attempted to establish that she received a brain injury affecting her ability to remember (Vol. XXIII, TR. 1749), inquired as to whether she had told jail inmate Tonya Sterling that Trease had made her put her hand on the gun and that she shot Edenson (Vol. XXIII, TR. 1805)(Siegel denied making such a statement), asked her if she had told jail inmate Janene Silkwood that she had killed Edenson (Vol. XXIII, TR. 1807)(Siegel denied so telling her), examined her on the fact that she was not charged with robbery with a firearm or burglary of a dwelling and the circumstances of her no contest plea to the reduced charge of second degree murder and avoiding a possible death sentence (Vol. XXIII, TR. 1811-1818), and that she had not been charged in the Shorin burglary (Vol. XXIII, TR. 1814). Defense counsel examined Ms. Siegel that part of her agreement with the prosecutor was an agreement to testify against Trease (Vol. XXIII, TR. 1814) and that

she had agreed to testify consistently with what she had told the police on August 24 and August 26 and that if she did not testify consistently the state could withdraw the deal (Vol. XXIII, TR. 1815). The defense even introduced a letter -- Defendant's Exhibit D -- and called the witness' attention to paragraph 4 of that letter concerning her testimony which the prosecutor had written to her lawyer, Mr. Given (Vol. XXIII, TR. 1816-1818).

As part of its response to the defense invitation, the prosecutor called Pennsylvania Trooper Harry Keffer who identified Siegel's taped statement of August 24 -- made at a when Siegel was not under arrest or charged with the Edenson murder (Vol. XXVI, TR. 2255) -- and exhibits 99 and 100 were introduced into evidence; the tape was played to the jury (Vol. XXVI, TR. 2263-2318).

In Chandler v. State, 702 So.2d 186, 197-198 (Fla. 1997) this Court explained:

Prior Consistent Statement

> Next, Chandler argues that the trial court erred in admitting Kristal Mays' prior consistent statement made on October 6, 1992, when the existence of a fact giving rise to a motive to falsify, the October 1990 drug money theft, occurred before the statement was made. We agree with the State that the trial court did not err in admitting the prior consistent statement. We also find any potential error harmless.
>
> [13] We have long held that prior consistent statements "are generally inadmissible to corroborate or bolster a witness' trial testimony." *Rodriguez v. State,* 609 So.2d 493, 499 (Fla.1992); *Jackson*

> *v. State,* 498 So.2d 906, 909 (Fla.1986); *Parker v. State,* 476 So.2d 134, 137 (Fla.1985); *Van Gallon v. State,* 50 So.2d 882 (Fla.1951). Since such statements are usually hearsay, "they are inadmissible as substantive evidence unless they qualify under an exception to the rule excluding hearsay." *Rodriguez,* 609 So.2d at 500 (citing Charles W. Ehrhardt, *Florida Evidence,* § 801.8 (1992 ed.)). However, prior consistent statements are considered non-hearsay if the following conditions are met: the person who made the prior consistent statement testifies at trial and is subject to cross-examination concerning that statement; and the statement is offered to "rebut an express or implied charge ... of improper influence, motive, or recent fabrication." *Rodriguez,* 609 So.2d at 500 (quoting section 90.801(2)(b), Florida Statutes (1989)).
>
> * * *
>
> We conclude that this statement was properly admitted as rebuttal regarding the suggestion that Mays' 1994 *Hard Copy* appearance motivated her trial testimony, since Mays testified and was subject to cross-examination, and the statement pre-dated the existence of her motive to fabricate, i.e., the *Hard Copy* appearance. *See* § 90.801(2)(b), Fla. Stat. (1993). The October 1992 statement was undisputedly made after the October 1990 drug money incident. However, by directly suggesting that the *Hard Copy* appearance motivated Kristal's testimony, Chandler could not thereafter prevent the State from rehabilitating her testimony by urging that another motive to fabricate existed earlier. That was a choice that the defendant made in urging more than one reason to fabricate at trial. Having made this choice, he must suffer its natural consequences.

See also F.S. 90.801(2)(b)(statement is not hearsay if declarant testifies at trial and is subject to cross-examination concerning

the statement and is offered to rebut an express or implied charge against the declarant of improper influence, motive or recent fabrication); Dufour v. State, 495 So.2d 154, 160 (Fla.), cert. denied, 479 U.S. 1101, 107 S.Ct. 1332, 94 L.Ed.2d 183 (1987)(prior consistent statement made after robbery attempt but before the robbery plea negotiation and the filing of the Georgia murder charge properly admitted); Kellem v. Thomas, 287 So.2d 733, 734 (Fla. 4DCA 1974); Kelley v. State, 486 So.2d 578, 582 (Fla.), cert. denied, 479 U.S. 871, 107 S.Ct. 244, 93 L.Ed.2d 169 (1986)(where defense cross-examined witness about a laundry list of crimes for which he had been given immunity in exchange for his testimony there was no abuse of discretion in admitting statement made prior to immunity to rebut the charge of recent fabrication or improper motive); Anderson v. State, 574 So.2d 87, 92 (Fla.), cert. denied, 502 U.S. 834, 112 S.Ct. 114, 116 L.Ed.2d 83 (1991)(prior consistent statement admissible because it was made before plea agreement); Stewart v. State, 558 So.2d 416, 419 (Fla. 1990); Edwards v. State, 662 So.2d 405 (Fla. 1DCA), review dismissed, 679 So.2d 772 (Fla. 1996).

In Shellito v. State, 701 So.2d 837, 841 (Fla. 1997), this Court explained:

> Section 90.801(2)(b), Florida Statutes (1995), allows a prior consistent statement to be used "to rebut an express or implied charge against the declarant of improper influence, motive, or recent fabrication." Shellito contends that this exception is inapplicable

> here because the motive to fabricate arose before Bays made the post-arrest statement; that is, Bays was under arrest for armed robbery at the time he made his statement. We disagree. First, the motive to fabricate does not necessarily arise simply because the witness has been arrested and charged with a crime. *See, e.g., Anderson v. State,* 574 So.2d 87 (Fla.1991)(witness's prior consistent statements to police officer, given the night of her arrest but before her plea agreement, were admissible to rebut implication of recent fabrication because motive to fabricate arose after plea agreement); *Edwards v. State,* 662 So.2d 405 (Fla. 1st DCA 1995), *review dismissed,* 679 So.2d 772 (Fla.1996). Second, the questioning on cross-examination brought out information which made it appear that Bays had obtained details about the crime through newspaper articles and police reports, which were not written until after Bays had given the statement. Thus, as the trial court recognized, the officer's testimony was necessary to rebut the "inference of recent fabrication based on information obtained." However, even were we to conclude that the officer's testimony was erroneously admitted, we would find the error to be harmless. The officer's testimony was brief and at least two other witnesses testified that Shellito had bragged to them about committing the murder.

Appellant’s protestations to the contrary notwithstanding, Trease’s cross-examination of Hope Siegel opened the door to the prosecutor’s demonstrating that her present testimony was not false or fabricated to obtain the benefits of the plea.

Appellant’s claim at page 53 of the brief that counsel did not suggest or imply there were multiple reasons or motives to fabricate is not accurate. For example, in the defense closing argument Trease argued that Siegel in return for her plea to second

degree murder and to obtain a sentence of ten to twenty years must testify truthfully and consistently with the statements she made to police and to the proffer given the state and that she has not yet been sentenced (Vol. XXIX, TR. 2735-2736). Counsel also argued that in considering witnesses' testimony they should consider "Has the witness been offered or received any money, preferred treatment, or other benefit in order to get the witness to testify?" and "Did the witness have some interest in how the case was decided?" (Vol. XXIX, TR. 2738). Quite apart from closing argument, the defense cross-examination of Siegel chose to put in issue whether her plea agreement and Defendant's Exhibit D (the prosecutor's letter to Siegel's attorney) required her to testify consistently, as well as truthfully, with her pre-plea bargain statements to the authorities (Vol. XXIII, TR. 1810-1818). Having chosen to make an issue of whether Ms. Siegel's statements were both consistent and truthful or not, Trease cannot complain of the jury's receipt of evidence of her August 24 taped statement to Trooper Keffer prior to the filing of charges and the entry of her plea to a reduced charge. Chandler, *supra*.

All evidence that tends to convict is prejudicial. Amoros v. State, 531 So.2d 1256, 1260 (Fla. 1988). Appellant's complaint that it was unfairly prejudicial because the tape contains emotional utterances of Hope Siegel must be rejected; it is not unfairly prejudicial since Heather Tomlinson had previously

testified without objection that upon Siegel's arrival in Pennsylvania when not in the presence of defendant Siegel was crying, shaking and visibly upset (Vol. XXV, TR. 2084-2088).

Finally, even if the lower court did commit error, it was harmless error. See Chandler, *supra*, at 198-199; Anderson, *supra*, at 93; Shellito, *supra*, at 841; State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). See also Alvin v. State, 548 So.2d 1112 (Fla. 1989)(trial court did not err in admitting tape recorded statement of Remy to rebut the inference that he had fabricated his story because the state granted him immunity in exchange for his testimony; to the extent the tape was consistent with his trial testimony, it was admissible for this purpose. Admission of portions of the tape containing matters not testified to was harmless error). In the instant case the prosecutor, defense and the court engaged in a thorough review of the tape to redact material that Siegel had not testified about in order to satisfy the Alvin requirements (Vol. XXV, TR. 2168-2191).

ISSUE IV

WHETHER THE TRIAL COURT ERRED REVERSIBLY IN ADMITTING EVIDENCE OF ALLEGEDLY BAD ACTS OF TREASE.

At a hearing conducted November 22, 1996, the trial court considered the defense objection to the state's multiple notices of intent to rely on similar fact evidence (Vol. XIV, R 327-342). With respect to the first notice filed by the state pertaining to the burglary of David Shorin wherein a gun was stolen used in the instant homicide as well as a safe [the safe recovered where Hope Siegel claimed Trease had discarded it after the Edenson murder], defense counsel conceded "with all honesty to the Court, as it relates to Mr. Shorin, I believe it's not truly similar fact evidence. It's one of a case where the facts and the finding of the gun are inextricably intertwined with the murder case and therefore, it's not truly similar fact evidence" (Vol. XIV, R. 329). The remaining notices, the defense argued, concerned incidents which were not sufficiently similar (Vol. XIV, R. 331). The prosecutor answered that all the notices were filed in an abundance of caution, that the Shorin burglary was not similar fact but constituted admissible evidence since the stolen 9 mm. Glock was the weapon used in the Edenson homicide and recovered by police in the bedroom Trease was using in Pennsylvania (Vol. XIV, R. 331-332).

With respect to testimony of Brigitte Berousek and Heather

Tomlinson regarding appellant's efforts to request their assistance in targeting other potential robbery victims, the prosecutor argued that (1) it was a unique modus operandi for a defendant to ask co-participants about people they knew who had safes for them to commit burglaries, and (2) was corroborative of the testimony of the state's chief witness where that witness' credibility is attacked (Vol. XIV, R. 334-335). With respect to the notices involving the burglaries of Joseph Bavaro and Ken Creye, the prosecutor represented that he had not decided whether to use that evidence -- which also involved Trease and Hope Siegel -- the prosecutor did not think he would use that evidence (Vol. XIV, R. 337), and appellant acknowledges (Brief, p. 55) that the prosecutor did not offer testimony about Creye and Bavaro. The court announced it would deny the defense motion to strike as it related to the Shorin burglary whence the gun used in the Edenson homicide derived and would take the remainder under advisement (Vol. XIV, R. 339, 341-342).

Appellant does not appear to challenge in this appeal the correctness of the ruling concerning the Shorin burglary which is understandable. See Griffin v. State, 639 So.2d 966 (Fla. 1994); Amoros v. State, 531 So.2d 1256 (Fla. 1988); see also Voorhees v. State, 699 So.2d 602, 608 n 4 (Fla. 1997)(trial court did not err in admitting into evidence defendant's possession of a knife because it was relevant, as there was testimony linking the knife

to the murder scene as well as to the stolen car).

Trease raises a number of complaints under this point -- which he characterizes as improper other bad acts -- that Heather Tomlinson and Bridgette Berousek testified about appellant's request to provide information about people who had a safe or money, that he lied to Hope Siegel, Becky Bishop and Edjanira Viana by telling them he worked for law enforcement agencies, that there was testimony of witnesses that Trease was familiar with or practiced martial arts and demonstrated the use of knives on one's throat, that Trease used medications Vicodin and Valium for an asserted heart condition when such medications do not aid the heart, and the court disallowed testimony from Berousek that Siegel was angry and appeared to be under the influence of drugs or alcohol during an encounter at her job site. Although many of these assertions do not seem to be Williams-rule issues, appellee will address them, *infra*.

(1) The Tomlinson-Berousek Testimony of Trease's Requests for Information Targeting People Who Had Safes or Money:

Appellant contends that it was improper for witnesses Tomlinson and Berousek to provide testimony regarding his requests that they provide information on people to target who had money or safes (Vol. XXV, TR 2098-2100; Vol. XXVII, TR. 2451); Trease argues that these conversations were not completed burglaries, citing Audano v. State, 641 So.2d 1356 (Fla. 2DCA 1994), a child sexual battery case where the appellate court concluded that the standards

of Heuring v. State, 513 So.2d 122 (Fla. 1987), were not met. Appellee would submit that in Malloy v. State, 382 So.2d 1190, 1192 (Fla. 1979), this Court rejected a defense contention that improper Williams-rule[7] evidence was introduced since ". . . the circumstances of the lounge incident do not establish all the elements of a crime, and, consequently, the question of the admissibility of prior criminal acts is not present." See also Swafford v. State, 533 So.2d 270 (Fla. 1988) (testimony of witness that defendant admitted "you just get used to it" when asked if it bothered him to shoot a girl in the head was relevant evidence tending to prove that he had committed such a crime two months earlier; it did not matter that he had also suggested a crime that had not been committed. Even if the proposal and solicitation were not similar enough to show modus operandi, it was not unfairly prejudicial).

Trease's pre-homicide request to Bridgette Berousek in March -- five months prior to the burglary and murder of Paul Edenson -- was relevant and admissible evidence. The issue at trial was whether Trease murdered Edenson and committed a burglary and robbery at his residence. Eyewitness Hope Siegel insisted that she met the victim pursuant to appellant's desire that she examine the residence for the whereabouts of a safe containing valuables (as Siegel and Trease had done previously in the Shorin burglary). The

[7]Williams v. State, 110 So.2d 654 (Fla. 1959).

defense offered the thesis that Siegel killed Edenson because she was jealous of Trease's paying attention to other women at a bar and his arrest in Pennsylvania in possession of the gun used in the killing was . . . a mistake. Thus, appellant's prior request to Berousek was not submitted to show mere propensity but rather was specific activity showing a modus operandi of discovering and targeting potential wealthy victims who had readily available assets in their homes and his intent; it also is corroborative of Siegel's testimony. See generally Ferrell v. State, 686 So.2d 1324 (Fla. 1996)(evidence of robbery of victim days earlier explained defendant's motivation in seeking to prevent retaliation by victim); Foster v. State, 679 So.2d 747 (Fla. 1996) (other crime evidence admissible to show defendant's motive and intent); Hoefert v. State, 617 So.2d 1046 (Fla. 1993)(testimony of other choking victims relevant to issue of motive); Williams v. State, 622 So.2d 456 (Fla. 1993)(evidence of attempted murder in Jacksonville four months prior to Pensacola murders relevant to show modus operandi in operation of his drug business). Jensen v. State, 555 So.2d 414 (Fla. 1DCA), review denied, 564 So.2d 1086 (Fla. 1990)(evidence of prior burglaries on victim's house admissible to prove intent since the more frequently an act is done the less likely that it is innocently done). Evidence of other crimes or acts can be admissible to prove motive and in such a case it is not necessary that the evidence be similar. Finney v. State, 660 So.2d 674 (Fla.

1995). It is also corroborative of Siegel's testimony whose credibility appellant mightily challenged. *See* C. Jones v. State, 610 So.2d 105 (Fla. 3DCA 1992)(letter from defendant to his wife containing references to his prior drug use admissible in prosecution for aggravated child abuse and battery since wife had testified that defendant was under the influence of drugs during one of the offenses charged; his admissions in the letter were relevant to corroborate her testimony).

With respect to Trease's post-homicidal request to Tomlinson, that similarly tends to support Hope Siegel's testimony regarding the unsuccessful effort to find a safe containing valuables during the Edenson burglary-murder and the limited proceeds obtained from that crime.

Even if the Court were to find that the introduction of evidence of witnesses Berousek and Tomlinson that appellant asked about people with safe or money was error, such error was harmless. See Gibson v. State, 661 So.2d 288, 292 (Fla. 1995)(harmless error to admit testimony of two witnesses that defendant had asked to have anal intercourse with them which they declined since the witnesses had declined the request and, there was compelling evidence of guilt despite the absence of eyewitness identification [which the instant case does have]).

(2) Appellant's Lies to Siegel, Bishop, and Viana About Employment as a Law Enforcement Agent:

Trease complains about testimony from Siegel, Bishop and Viana

that he had lied to them by claiming to be involved in law enforcement (Vol. XXIII, TR. 1625; Vol. XXIV, TR 1977-1978; Vol. XXV, TR. 2231). Appellee submits that telling a lie about one's employment to girlfriends or to those whom one meets at a bar is not a crime or bad act prohibited by F.S. 90.404. In any event, appellant's representing himself as a law enforcement officer to Viana at the Cha Cha Coconuts -- as well as representing Hope Siegel as a police agent to both Margarida Wortmann (Vol. XXIV, TR 1951-1952) and Edjanira Viana (Vol. XXIV, TR 1979) -- was significant because according to Siegel she and Trease argued outside the establishment, Trease complaining that she had "messed things up", that the two Brazilian women had money (Vol. XIII, TR 1649-1651). This testimony found support in the Viana testimony that she was wearing five or six rings and that she wrote her phone number on a piece of paper when Trease requested it (Vol. XXIV, TR 1972-1977) after Wortmann corrected her friend's representation that she was too poor to have a phone (Vol. XXIV, TR 1974) by telling Trease that Viana was "a very rich woman" (Vol. XXV, TR 2195-2196). Appellant's minor lies about his police employment were relevant to the specific larcenous intent he had on the night of the Edenson burglary-robbery-homicide and his use of Siegel to investigate the victim's premises, and tended to negate the defense hypothesis that Siegel killed Edenson because of jealousy.

(3) Trease's Proficiency or Familiarity with the Martial Arts and Combat Use of Knives:

Appellant complains that witness Colson testified about Trease's demonstrated proficiency with a knife (Vol. XXVII, TR. 2440-2445) and that witness Berousek corroborated the Hope Siegel testimony that Trease practiced martial arts (Vol. XXVII, TR. 2451).[8] The trial court, citing Swafford v. State, 533 So.2d 270 (Fla. 1988), ruled that knowledge of knives and the martial arts was not Williams-rule similar fact evidence (Vol. XXVII, TR 2424-2437). The defense acknowledged that martial arts testimony was "relevant to show that he knew how to do those things" (Vol. XXVII, TR. 2430-2431).

The testimony relating to appellant's familiarity, proficiency and skill with the martial arts and knives was relevant and admissible,[9] especially given the nature of victim's injuries. See Pittman v. State, 646 So.2d 167, 170 (Fla. 1994)(approving the admission of evidence that defendant once made a gas bomb because relevant to the murder-arson charges being prosecuted).

(4) Trease's Use of Medications for an Asserted Heart Condition:

Appellant also complains that the prosecutor improperly demonstrated that Trease was lying when he claimed that he was taking the medication Vicodin and Valium for a heart condition.

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[8]Appellant did not contemporaneously renew his objection to this testimony by Berousek (Vol. XXVII, TR. 2451), and thus it is procedurally barred. Hazen v. State, 700 So.2d 1207 (Fla. 1997).

[9]No notice was required because F.S. 90.404(2)(a) is inapplicable; the evidence is admissible under F.S. 90.402. See Tumulty v. State, 489 So.2d 150, 153 (Fla. 4DCA 1986).

First of all, it was proper for Detectives Robinson and Wildtraut to testify about this (Vol. XXVII, TR. 2488-2489, TR 2513, 2519) and for the state to have Dr. Sprehe testify to the purpose and effects of such medication (Vol. XXVII, TR. 2537-2541) since that testimony was relevant to show not only that Trease did not have the asserted heart condition, but also that Trease's claim during questioning after consent to Miranda warnings that the medications were affecting his memory of events about the homicide was untruthful since Dr. Sprehe explained they would have had a negligible affect on the ability to remember events of the past seven to ten days (Vol. XXVII, TR. 2540). While appellant may have a right to decline to talk to police and assert his Fifth Amendment privilege, he has no concomitant right to speak to the police and provide lies to obstruct an investigation. See, e.g., Brogan v. United States, 522 U.S. ___, 139 L.Ed.2d 830 (1998). Having chosen to answer -- and to answer falsely thus betraying guilty knowledge -- the prosecutor could prove that fact, much as he could by calling a witness to refute an alibi urged by the defendant. That other witnesses may have also testified that Trease repeated the same or similar lie to them on other occasions is merely cumulative.[10]

[10]Appellant does not declare whether his criticism of the prosecutor's efforts to show that on occasion Trease told lies also extends to Trease's comments to Sarasota Detectives Robinson and Wildtraut that Hope Siegel did not commit the Edenson homicide and that he might have to take the fall (Vol. XXVII, TR. 2519-2521).

(5) The Rejected Proffer of Berousek Regarding the Encounter with Hope Siegel:

The record reflects that on cross-examination of Berousek the defense asked if she had met Hope Siegel and the witness answered that in April Siegel visited her employment and attempted to discuss her relationship with Trease (Vol. XXVII, TR. 2453). At a bench conference requested by the defense, the defense indicated not being comfortable asking the question whether Siegel appeared to be under the influence of drugs or alcohol (Vol. XXVII, TR. 2454). Berousek then testified Siegel appeared to be upset and angry that night (Vol. XXVII, TR. 2455). Afterwards, outside the jury's presence, Berousek on a proffer stated that Siegel appeared to be under the influence of drugs or alcohol when she visited Berousek's place of employment because she talked fast and didn't make any sense (Vol. XXVII, TR. 2462-2463). The defense did not seek further action by the court.[11]

With respect to the American gigolo comment, on direct examination of Trooper Terek the court sustained a defense objection to a question about how Trease had described his relationship with other women; the prosecutor unsuccessfully argued that the state's theory was that Trease was controlling Hope Siegel (Vol. XXV, TR. 2118-2119). When the prosecutor asked Agent Sykes if appellant had referred to himself as a great American gigolo,

[11]Hope Siegel on cross-examination admitted being upset when she visited Berousek's office but was not asked if she was under the influence of drugs or alcohol at the time (Vol. XXIII, TR. 1753).

the court sustained the defense objection and instructed the jury to disregard the question and answer (Vol. XXV, TR. 2135-2136). The prosecutor agreed not to bring it up again when the defense made an oral motion in limine (Vol. XXV, TR. 2137). There was no mistrial request.

Almost all evidence to be introduced by the state in a criminal prosecution will be prejudicial to a defendant. Only where the unfair prejudice substantially outweighs the probative value of the evidence should it be excluded. Amoros v. State, 531 So.2d 1256, 1259 (Fla. 1988); Wuornos v. State, 644 So.2d 1000, 1007 (Fla. 1994). In the instant case appellant has failed to demonstrate an abuse of discretion in the lower court's admission of evidence.

No reversible error appears.

ISSUE V

WHETHER THE LOWER COURT ERRED REVERSIBLY IN ASSIGNING LITTLE OR NO WEIGHT TO THE MITIGATING FACTOR OF ADJUSTING WELL TO INCARCERATION AND ASSISTING IN PREVENTING ANOTHER INMATE'S SUICIDE.

The trial court's sentencing findings recite among the non-statutory mitigators:

> a. That defendant has adjusted well to incarceration and has conducted himself in an appropriate manner while in jail awaiting trial in this case. He assisted in the prevention of a fellow inmate's suicide. I find this factor to have been established to exist by the greater weight of the evidence; however, I give it little or no weight.

(Vol XII, R 2237)

Even the defense acknowledged in its argument to the jury that the incident wherein Trease yelled to jailers about another inmate's suicide attempt was "not the greatest mitigation in the world" (Vol. XXXI, TR 3043) and appellee notes that there was testimony that other inmates as well as Trease who alerted guards to the inmate's attempted suicide (Vol. XXX, R 2925).

The trial court adequately complied with the requirements of Campbell v. State, 571 So.2d 415 (Fla. 1990) by giving minimal weight to this non-statutory mitigating factor. See Gudinas v. State, 693 So.2d 953, 966 and fn 16 (Fla. 1997); Sims v. State, 681 So.2d 1112, 1119 (Fla. 1996)(finding that Campbell had been satisfied by the trial court's according "little or no weight" to the proffered mitigators).

Even if there were error it would be harmless in light of the substantial aggravation found in comparison to the weak non-statutory mitigation presented. See, e.g., Thomas v. State, 693 So.2d 951 (Fla. 1997).

ISSUE VI

WHETHER THE LOWER COURT ERRED REVERSIBLY IN FINDING THE AGGRAVATING FACTOR OF HOMICIDE COMMITTED TO AVOID ARREST.

The trial court in its sentencing findings determined:

> 3. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
>
> Defendant and the victim knew one another. They had engaged in a business relationship immediately prior to the killing. The defendant, at the time of the crimes, was not concealed and made no attempt to conceal his identity from the victim. Defendant told his accomplice, HOPE SIEGEL, that he killed the victim in order to prevent his identification and because the victim had torn defendant's shirt.
>
> The existence of this aggravating circumstance was established beyond a reasonable doubt. Furthermore, the evidence established that the dominant motive for the killing was the avoidance or prevention of arrest.

(Vol. XII, R 2236)

Appellant complains that the trial court erroneously found the presence of this aggravator because under Preston v. State, 607 So.2d 404 (Fla. 1992) the sole or dominant motive for the murder was not the elimination of a witness; appellant argues that the homicide may have resulted from rage following the victim's having torn appellant's shirt.

Appellant's accomplice who was present during the murder Hope

Siegel testified:

> Q. Miss Siegel, did he ever on the way up north to Pennsylvania ever tell you why he had killed Paul Edenson?
> A. He told me -- he told me it was because he could identify us and -- and, um, um, um -- he said he tore his shirt.

(Vol. XXIII, TR 1734)

Additionally the state elicited testimony through mechanic Ismail Elginer who worked for victim Paul Edenson at Bayview Motorcars that appellant Trease had previously -- in February -- brought a Mercedes-Benz in and had been by everyday for a week at that time. Trease and his girlfriend would be sitting with Paul's desk in the showroom (Vol. XXIV, TR 1937-1940). This Court has held that the witness elimination aggravating factor may be shown by circumstantial evidence from which the motive may be inferred without direct evidence of the offender's thought processes. Preston v. State, 607 So.2d 404, 409 (Fla. 1992); Swafford v. State, 533 So.2d 270, 276 n 6 (Fla. 1988); Hall v. State, 614 So.2d 473, 477 (Fla. 1993). Here, in addition to the circumstantial evidence of Elginer's testimony that Trease had been a previous Edenson customer, the record provides direct evidence of appellant's admission to Siegel regarding his concern for the victim's ability to identify him. See, Swafford, *supra*; Kokal v. State, 492 So.2d 1317, 1319 (Fla. 1986); Bottoson v. State, 443 So.2d 962, 966 (Fla. 1983); Herring v. State, 446 So.2d 1049 (Fla. 1984). See also Harmon v. State, 527 So.2d 182, 188 (Fla. 1988)

(victim knew the defendant and would easily have identified him in the robbery); Derrick v. State, 641 So.2d 378, 380 (Fla. 1994)(where defendant's goal was to steal the victim's money, avoid arrest aggravator properly found since victim knew defendant from previous encounters, the victim recognized the defendant during the attack and defendant admitted the stabbing to shut up the victim). Appellee additionally notes that Trease had three prior robbery convictions, leading to imprisonment where he had not utilized deadly force. Appellant's hypothesis that the insignificant factor of having his shirt ripped may have fueled an irrational homicidal rage need not be accepted, especially in light of appellant's assertion at sentencing that he was innocent and that Trease believed this had been a "hit" (Vol. XXXI, TR 3084-3085). It is absurd to believe that after the shirt-tearing initial assault Trease repeatedly threatened the victim with death unless he turned over the sought-for safe and then proceeded to slice his throat (after a gunshot to the head) with a dominant motive to avenge the torn shirt. See also Howell v. State, ___ So.2d ___, 23 Florida Law Weekly S90 (Fla. 1998)(that defendant may have had other motives for murdering victim does not preclude witness elimination as a dominant motive).

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 Andrea Norgard, Assistant Public Defender, Public Defender's Office, Post Office Box 9000 -- Drawer PD, Bartow, Florida 33831, this _____ day of April, 1998.

COUNSEL FOR APPELLEE