IN THE SUPREME COURT OF FLORIDA

CASE NO. 90,153

MANUEL ANTONIO RODRIGUEZ,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, CRIMINAL DIVISION

BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF CITATIONS iv

POINTS ON APPEAL 1

STATEMENT OF THE CASE AND FACTS 2

SUMMARY OF THE ARGUMENT 46

ARGUMENT 48

I. NEITHER DETECTIVE VENTURI NOR THE PROSECUTOR IMPROPERLY COMMENTED ON DEFENDANT'S RIGHT TO SILENCE. 49
1. Venturi's Testimony 49
2. Closing Argument 53

II. DEFENDANT'S CLAIM THAT THE TRIAL COURT'S ERRONEOUSLY REFUSED TO ALLOW A PEREMPTORY CHALLENGE IS UNPRESERVED AND WITHOUT MERIT WHERE THE REASON GIVEN WAS PRETEXTUAL. 57

III. THE PROSECUTION'S REASONS FOR ITS PEREMPTORY CHALLENGE WERE FACIALLY NEUTRAL AND SUPPORTED BY THE JUROR'S STATEMENTS AND THE OBSERVATIONS OF BOTH THE TRIAL COURT AND DEFENSE COUNSEL BELOW. 63

IV. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE THAT REBUTTED THE DEFENSE'S INSINUATION DURING THE CROSS-EXAMINATION OF TWO WITNESSES THAT DEFENDANT WAS NON-VIOLENT AND THAT THE CODEFENDANT HAD MANUFACTURED HIS TESTIMONY AGAINST DEFENDANT AND DEFENDANT MAY NOT NOW COMPLAIN THAT SUPPOSED OTHER CRIMES EVIDENCE WAS ADMITTED AGAINST HIM WHERE HE DECLINED ALL OFFERS TO CURE THE INADVERTENT COMMENT BELOW. 69
1. Evidence of Defendant's Prior Violent Acts . . 69
2. Reference to a Police ID Number 74
3. Misstatement as to the Number of Aliases . . . 75
4. Harmless Error 79

V. THE TRIAL COURT PROPERLY PERMITTED THE STATE TO ELICIT HEARSAY TESTIMONY DURING THE PENALTY PHASE WHERE THE DEFENSE HAD DEPOSED THE DECLARANT, THE DECLARANT WAS AVAILABLE TO TESTIFY IF THE DEFENSE WISHED TO CALL HIM, AND THE DEFENSE WAS GIVEN SEVERAL OPPORTUNITIES TO CROSS-EXAMINE THE WITNESS, AND CALL ANY SURREBUTTAL WITNESSES IT DESIRED . . . 80

VI. DEFENDANT WAS NOT DENIED THE OPPORTUNITY TO PRESENT MITIGATION EVIDENCE WHERE, ALTHOUGH AN OBJECTION TO TESTIMONY AS TO WHETHER DEFENDANT KNEW RIGHT FROM WRONG WAS SUSTAINED, THE SAME WITNESS SUBSEQUENTLY GAVE THAT EXACT TESTIMONY WITHOUT OBJECTION. . . . 85

VII. THE TRIAL COURT DID NOT IMPROPERLY FAIL TO MERGE THE BURGLARY AND PECUNIARY GAIN/ROBBERY FACTORS. . 85

VIII. THE TRIAL COURT PROPERLY DETERMINED THAT THESE MURDERS WERE COLD, CALCULATED AND PREMEDITATED. . . 90

IX. THE TRIAL COURT PROPERLY DETERMINED THAT THE AVOID-ARREST AGGRAVING CIRCUMSTANCE APPLIED. 96

CONCLUSION 100

CERTIFICATE OF SERVICE 100

TABLE OF CITATIONS

CASES **PAGE**

Austin v. State,
679 So. 2d 1197 (Fla. 3d DCA, 1996) 62

Bates v. State,
465 So. 2d 490 (Fla. 1985) 86

Brown v. State,
473 So. 2d 1260 (Fla. 1985) 86

Brown v. State,
565 So. 2d 304 (Fla. 1990) 95

Brown v. State,
597 So. 2d 369 (Fla. 3d DCA 1992) 68

Bullock v. State,
670 So. 2d 1171 (Fla. 3d DCA 1996) 68

Cave v. State,
476 So. 2d 180 (Fla. 1985) 98

Clark v. State,
443 So. 2d 973 (Fla. 1983) 98

Clark v. State,
613 So. 2d 412 (Fla. 1992) 83

Cook v. State,
581 So. 2d 141 (Fla. 1991) 99

Damren v. State,
696 So. 2d 709 (Fla. 1997) 82

Davis v. State,
691 So. 2d 1180 (Fla. 3d DCA 1997) 61,62

Dudley v. State,
545 So. 2d 857 (Fla. 1989) 92,93

Dufour v. State,
495 So. 2d 154 (Fla. 1986) 55

Engle v. State,
438 So. 2d 803 (Fla. 1983) 83

CASES **PAGE**

Fotopoulos v. State,
608 So. 2d 784 (Fla. 1992) 98

Franqui v. State,
699 So. 2d 1332 (Fla. 1997) 62

Freeman v. State,
563 So. 2d 73 (Fla. 1990) 99

Gamble v. State,
659 So. 2d 242 (Fla. 1995) 95

Gardner v. State,
480 So. 2d 91 (Fla. 1985) 83

Geralds v. State,
601 So. 2d 1157 (Fla. 1992) 90,91,94

Gilliam v. State,
582 So. 2d 610 (Fla. 1991) 84

Givens v. State,
619 So. 2d 500 (Fla. 1st DCA 1993) 68

Gordon v. State,
704 So. 2d 107 (Fla. 1997) 93,94

Harmon v. State,
527 So. 2d 182 (Fla. 1988) 98

Heath v. State,
648 So. 2d 660 (Fla. 1994) 99

Herring v. State,
446 So. 2d 1049 (1984), ... 98

Hill v. State,
643 So. 2d 1071 (Fla. 1994) 96

Howell v. State,
23 Fla. L. Weekly S90 95,98

Hudson v. State,
538 So. 2d 829 (Fla. 1989) 99

CASES **PAGE**

Huff v. State,
495 So. 2d 145 (Fla. 1986) 73

Jones v. State,
440 So. 2d 570 (Fla. 1983) 73

King v. State,
514 So. 2d 354 (Fla. 1987) 82

Lambrix v. State,
494 So. 2d 1143 (Fla. 1986) 73

Lawrence v. State,
691 So. 2d 1068 (Fla. 1997) 83

Lightbourne v. State,
438 So. 2d 380 (Fla. 1983) 99

Lowe v. State,
650 So. 2d 969 (Fla. 1994) 99

McNair v. State,
579 So. 2d 264 (Fla. 2d DCA 1991) 68

Melbourne v. State,
679 So. 2d 759 (Fla. 1996) 60,61,63,64,66,67

Morton v. State,
689 So. 2d 259 (Fla. 1997) 92,93

Perkins v. State,
349 So. 2d 776 (Fla. 2d DCA 1977) 75

Porter v. State,
564 So. 2d 1060 (Fla. 1990) 95

Preston v. State,
607 So. 2d 404 (Fla. 1992) 98

Provenzano v. State,
497 So. 2d 1177 (Fla. 1986) 95

Purkett v. Elem,
514 U.S. 765 (1995) 68

CASES **PAGE**

Remeta v. State,
522 So. 2d 825 (Fla. 1988) 95

Rhodes v. State,
638 So. 2d 920 (Fla. 1994) 84

Riechmann v. State,
581 So. 2d 133 (Fla. 1991) 99

Rimes v. State,
645 So. 2d 1080 (Fla. 2d DCA 1994) 75

Roman v. State,
475 So. 2d 1228 (Fla. 1985) 74

Routly v. State,
440 So. 2d 1257 (Fla. 1983) 98

San Martin v. State,
705 So. 2d 1337 (Fla. 1997) 52,57

Slappy v. State,
522 So. 2d 18 (Fla.) 61,63

Smith v. State,
641 So. 2d 1319 (Fla. 1994) 99

Spencer v. State,
615 So. 2d 688 (Fla. 1993) 68

Spencer v. State,
645 So. 2d 377 (Fla. 1994) 83

Stein v. State,
632 So. 2d 1361 (Fla. 1994) 97

Swafford v. State,
533 So. 2d 270 (Fla. 1988) 95,98

Sweet v. State,
624 So. 2d 1138 (Fla. 1993) 95

Thompson v. State,
648 So. 2d 692 (Fla. 1994) 98

CASES **PAGE**

Tompkins v. State,
502 So. 2d 415 (Fla. 1986) 73

Toole v. State,
479 So. 2d 731 (Fla. 1985) 85

Trepal v. State,
621 So. 2d 1361 (Fla. 1993) 86,95

Valle v. State,
581 So. 2d 40 (Fla. 1991) 67

Watts v. State,
593 So. 2d 198 (Fla. 1992) 99

White v. State,
377 So. 2d 1149 (Fla. 1980) 56

Whitehead v. State,
279 So. 2d 99 (Fla. 2d DCA 1973) 75

Young v. State,
579 So. 2d 721 (Fla. 1991) 96

OTHER AUTHORITY

§90.802(18), Fla. Stat. 80

§90.806(1), Fla. Stat. 81

§90.806(2), Fla. Stat. 82

§921.141(2), Fla. Stat. 80,92

POINTS ON APPEAL

(Restated)

I. NEITHER DETECTIVE VENTURI NOR THE PROSECUTOR IMPROPERLY COMMENTED ON DEFENDANT'S RIGHT TO SILENCE.

II. DEFENDANT'S CLAIM THAT THE TRIAL COURT'S ERRONEOUSLY REFUSED TO ALLOW A PEREMPTORY CHALLENGE IS UNPRESERVED AND WITHOUT MERIT WHERE THE REASON GIVEN WAS PRETEXTUAL.

III. THE PROSECUTION'S REASONS FOR ITS PEREMPTORY CHALLENGE WERE FACIALLY NEUTRAL AND SUPPORTED BY THE JUROR'S STATEMENTS AND THE OBSERVATIONS OF BOTH THE TRIAL COURT AND DEFENSE COUNSEL BELOW.

IV. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE THAT REBUTTED THE DEFENSE'S INSINUATION DURING THE CROSS-EXAMINATION OF TWO WITNESSES THAT DEFENDANT WAS NON-VIOLENT AND THAT THE CODEFENDANT HAD MANUFACTURED HIS TESTIMONY AGAINST DEFENDANT AND DEFENDANT MAY NOT NOW COMPLAIN THAT SUPPOSED OTHER CRIMES EVIDENCE WAS ADMITTED AGAINST HIM WHERE HE DECLINED ALL OFFERS TO CURE THE INADVERTENT COMMENT BELOW.

V. THE TRIAL COURT PROPERLY PERMITTED THE STATE TO ELICIT HEARSAY TESTIMONY DURING THE PENALTY PHASE WHERE THE DEFENSE HAD DEPOSED THE DECLARANT, THE DECLARANT WAS AVAILABLE TO TESTIFY IF THE DEFENSE WISHED TO CALL HIM, AND THE DEFENSE WAS GIVEN SEVERAL OPPORTUNITIES TO CROSS-EXAMINE THE WITNESS, AND CALL ANY SURREBUTTAL WITNESSES IT DESIRED.

VI. DEFENDANT WAS NOT DENIED THE OPPORTUNITY TO PRESENT MITIGATION EVIDENCE WHERE, ALTHOUGH AN OBJECTION TO TESTIMONY AS TO WHETHER DEFENDANT KNEW RIGHT FROM WRONG WAS SUSTAINED, THE SAME WITNESS SUBSEQUENTLY GAVE THAT EXACT TESTIMONY WITHOUT OBJECTION.

VII. THE TRIAL COURT DID NOT IMPROPERLY FAIL TO MERGE THE BURGLARY AND PECUNIARY GAIN/ROBBERY FACTORS.

VIII. THE TRIAL COURT PROPERLY DETERMINED THAT THESE MURDERS WERE COLD, CALCULATED AND PREMEDITATED.

IX. THE TRIAL COURT PROPERLY DETERMINED THAT THE AVOID-ARREST AGGRAVING CIRCUMSTANCE APPLIED.

STATEMENT OF THE CASE AND FACTS

Defendant was charged, in an indictment filed on September 15, 1993, in the Eleventh Judicial Circuit of Florida in and for Miami-Dade County, Florida, case number 93-25817(B), with committing, on December 4, 1984: (1) the premeditated or felony murder of Bea Sabe Joseph; (2) the premeditated or felony murder of Sam Joseph; (3) the premeditated or felony murder of Genevieve Marie Abraham; and (4) the armed burglary of the dwelling occupied by the murder victims. Also charged in the indictment as to all counts, no. 93-25817(A), was Luis Rodriguez. (R. 5-8). Trial commenced on October 15, 1996. (T. 1674). The relevant portions of the voir dire will be discussed in the argument portion of this brief.

Virginia Nimer saw her sister, Genevieve Abraham, age 73, on December 4, 1994. Abraham was going to visit the Sam and Bea Joseph, after which she was to meet the Nimers for dinner. (T. 1754-56, 1760). The Nimers went to the restaurant, but Abraham never showed. (T. 1762). After repeated attempts at contacting Abraham, the Josephs, and their niece proved fruitless, Nimer went to the Josephs' home. (T. 1763). The front door was open about an inch. (T. 1766). Nimer went into the apartment. Abraham and the Josephs were all dead. (T. 1790-91). Abraham had been wearing several expensive items of jewelry, including her wedding band, a diamond watch and her diamond earrings. (T. 1758-59). They were missing. (T. 1798).

Tama Zaydon was the granddaughter of the Josephs, who were around 80 years old. Her parents owned the apartment building where the Josephs lived. The Josephs collected the rent and took care of needed repairs. (T. 1816). The day after the murder, Zaydon visited the apartment. (T. 1822). She told the police that the apartment was usually impeccably neat. After the murders it was a "big mess everywhere." (T. 1824). The jewelry Bea usually wore was missing. Sam also collected things unusual things including coins. (T. 1827-29).

There did not appear to be any forced entry into the apartment. (T. 1872). The bedroom had been disturbed. There were night tables on either side of the bed. The drawer of the left night stand was open. (T. 1885). There was a box of Remington .38 ammunition in the night stand drawer. (T. 1887). The master bedroom had a large walk-in closet. Things had been thrown about on the floor of the closet. (T. 1888). On the foot of the bed was a black suit, on top of which were a brown jewelry box and a potato chip bag. (T. 1890). Of nine drawers in the bedroom dresser, all but two were pulled out. (T. 1929).

Genevieve Abraham was seated in a chair near the front door and had a string of pearls around her left hand. (T. 1867, 1900). Bea, who was wearing a blue dress, had a silver necklace in her hand, and a bloody napkin also. (T. 1906). She was face down on the floor between the kitchen wall and the dining room table. (T. 1775). Sam

was found on the floor on other side of the table, with his legs under it. (T. 1910).

The Medical Examiner testified that Abraham had a bullet lodged in her left shoulder. (T. 2577). The bullet went through her right ear, and then into her head. (T. 2582). It fractured the scalp bone and then continued downward and fractured two cervical vertebrae, severed her spinal cord almost completely, and came to rest against her left shoulder bone. (T. 2584, 2588). She had a second bullet wound above her left eyebrow along the hairline. (T. 2569). The wound was surrounded by soot and stippling, indicating a close-range shot. (T. 2570). The bullet lodged in the bone above the eye socket, but did not penetrate into the brain. (T. 2572). The wound was consistent with a gun being fired next to the temple by a standing person while the victim was seated. (T. 2573). The way the body was found, the shot to the forehead would have been the second shot. Otherwise the shooter would have had to have lifted her body to deliver the shot through the right ear, which was lying against the chair when she was found. (T. 2586). The first wound would have caused death even without the shot to the forehead. (T. 2585).

Bea Joseph’s lips were swollen and bloody, and her upper lip had a one-eighth inch split. (T. 2602). The injury could have been caused by an elbow. (T. 2603-04). A bullet had entered one quarter of an inch to the right of the midline of Bea’s forehead. (T.

2609). The bullet penetrated the cranial cavity and into the left cerebral hemisphere from front to back, exited through the back of the occipital lobe, and lodged in the bone in that area, fracturing it. (T. 2610). She would have died very quickly as a result of this wound, within a couple of minutes, at most. (T. 2611). She would have been unable to make any voluntary movements after the shot. There was also a gunshot graze wound to the back of her neck. (T. 2612-15). That the bullet did not strike any part of her back indicated that her head and neck were bent forward at the time the graze wound was inflicted, probably after the shot to the forehead. (T. 2616). Bea had a discoloration on her left knee that appeared to be a post-mortem injury. (T. 2619). It would not have happened at the time she was shot, but later on, after she was fully dead.

Sam had an entrance wound on the back of the hand in the web between the thumb and index finger. On the other hand he had an exit wound on his palm. (T. 2624). He had an entry wound in the back of his left shoulder. (T. 2626). Sam also had two gunshot wounds to his cheek, very close together. (T. 2631). The more forward of the two bullets went into the cranial cavity after going through the maxilla. (T. 2633). It went into the right cerebral hemisphere. (T. 2634). The disruption to the frontal lobe would have caused his death within a few minutes. (T. 2635). The two to the face appear to have been in quick succession. The second bullet to the face was a little lower and went into the soft facial

tissue, then exited at the base of the neck. The facial wounds had stippling. (T. 2636). There was an injury to the back of the neck in addition to the exit wound the same bullet caused by grazing the folds in the skin as it exited. This indicated that Sam's head was thrown back at the time. (T. 2638).

On July 4, 1985, the police met with a tipster who identified himself as Antonio Heres Chait, and who stated that he was living in apartment 3 at the time of the murders. (T. 2177-78). Chait was in fact Defendant. (T. 2179). He told them that he saw two males running from the area of apartment 9 on the night of the crime. He stated that he knew one of them, and directed them to where he could be found. (T. 2180). The police determined that the tip was without merit. (T. 2181).

On November 25, 1985, they again met with Defendant, who now identified himself as Antonio Traves. (T. 2182). They confronted Defendant with the fact that he had given them two false names, and that the information in July had been "bogus." Defendant conceded that the previous information had been false. (T. 2183). Defendant made reference to a call having taken place around 6:30 or 7:00 the night of the murders, but they had not told him about the call. This made them suspicious. (T. 2185). Defendant said that he saw another individual by the name of Geraldo leaving the premises at that time. (T. 2186). On November 29, 1985, they met with Defendant again after investigating the Geraldo story. (T. 2187). They told

him that they were unable to verify this second story either. They then informed Defendant that they believed he was involved, and read him his rights. (T. 2188). After Defendant agreed to speak to the police, they informed him that they believed Defendant was involved in the crime. Defendant stated that he knew the Josephs, that he sometimes did work for them, and that Sam was a very stingy person. (T. 2192). When asked whether, having already given two false versions of the crime, he would tell what really happened, and what his role in the murders was, Defendant bowed his head and began to cry. (T. 2193). Defendant said that he was epileptic and that he was ill because of his medication, so they terminated the interview. (T. 2194).

The police had no further leads of consequence until March of 1992, when Ralph Lopez[1] gave them the names of people who were allegedly involved in the murders. (T. 2224). In late 1984 or early 1985, Lopez had had a conversation with codefendant Luis Rodriguez about the murders. (T. 3019). Luis said that he and Defendant had committed the crime. Lopez knew Defendant and that he was Cookie's boyfriend. (T. 3020). Luis told him that they went to the Josephs' apartment to rob them. He said two old ladies and an old man were killed. (T. 3021). The police determined that Apartment 3 had been occupied by Defendant and Cookie. Further investigation into this

[1] Lopez's sister, Velia was married to Isidoro Rodriguez, who was the brother of Luis, Defendant's codefendant, and Cookie, Defendant's girlfriend. (T. 2224).

lead was interrupted by Hurricane Andrew. (T. 2236).

In August 1993, the police contacted Luis at his place of business in Orlando. (T. 2241). They told him they were investigating the Joseph/Abraham murders, and asked him if he would come to the Sheriff's office. (T. 2242). Eventually, they told Luis that Defendant had suggested that he was involved.[2] Luis then slumped forward with a big sigh. (T. 2257). After he sighed and drooped, Luis said, "Putting me in a cell will never be as bad as living with what I did." (T. 2281). Luis ultimately gave a formal sworn stenographic confession. (T. 2284). Luis was arrested and transported to Miami. (T. 2293). When the arrived in Miami, before going to the police station, they went to a gas station on Miami Beach where the murder weapons had been thrown into a canal. (T. 2385). Luis pointed out the spot in the canal where they should look. (T. 2387). He noted that the seawall was different from how it had been in 1984. (T. 2838). The police divers discovered that there had been construction on the adjacent bridge, leaving a lot of debris, and that the canal had been dredged out after Hurricane Andrew. (T. 2400). The debris consisted of concrete and rebar, which impeded searching. They also were unable to use a metal detector because of all the rebar. They searched for two hours, but were unable to locate the firearms. (T. 2401-02).

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[2] The statement about Defendant was not true, they made it just to get Luis's reaction. (T. 2280).

Luis testified that he was charged with the murder of the Josephs and Abraham along with Defendant. Luis and Defendant were not related. (T. 2745). In December 1984, Luis was living in Orlando. (T. 2757). In November of 1984, Defendant called and asked him if he was interested in making some quick money. Defendant told him that he already had it planned out. Defendant said that it would only take ten minutes, and be well worth it. Luis assumed it would not involve actually taking anything from a person, as opposed to a house or business. (T. 2763).

Luis left Orlando on the day of the murders. (T. 2767). Luis did not own a gun at that time. He did not bring any guns with him from Orlando. (T. 2765). He traveled to Miami by plane. (T. 2769). He arrived at Cookie and Defendant's apartment around 6:30. Luis did not know the details of the plan at that point. (T. 2795). He asked Defendant what the plan was. Defendant again told Luis that he was just going to be the lookout, that Defendant would do all the work. Defendant said the victim was going to be the landlord. Defendant claimed that the landlord owed him and his son money. (T. 2796). At first Defendant told him that he was going to go to the landlord's and demand money and jewelry. Luis did not know where the landlord lived at that time. Then Defendant told him that they lived in the building. Luis had met them once or twice before, once when his nephew was washing their cars. (T. 2797). He also saw them once when he took a message from Cookie to Defendant, who was

working in their apartment. (T. 2798). Defendant said that the Josephs had money, jewelry, and a coin collection. Defendant told Luis his “cut” would be between $50,000 and $80,000. (T. 2843). After the conversation, Defendant left for about five minutes. (T. 2799). Even at that point, Defendant had not made clear Luis’s role, other than as lookout.

Then they left Cookie’s apartment, and Luis saw a gun handle protruding from the back of Defendant’s pants. (T. 2800). Then they went directly to the Joseph apartment. Defendant told Luis that he should tell the landlord that he had a friend who was holding Cookie and the children hostage unless the Josephs gave them money and “stuff.” (T. 2802). On the way to the Joseph apartment Defendant told Luis to stay behind him and repeat the story about the hostages. (T. 2803). When he knocked on the door, Defendant shoved a gun into Luis’s waistband. Luis was wearing jeans, a shirt and a sports jacket. (T. 2804). The gun was a small black revolver. It was about six inches long. Luis was not familiar with guns. He did not know what caliber it was. He hid the gun under his jacket. (T. 2805). At that point, Sam opened the door part way. Defendant told Sam that he needed to talk to him, and told him the hostage story. In fact, no one was being held hostage. Defendant then pushed his way in. (T. 2806). Luis followed him in.

Once inside, Defendant told Sam to sit at the dining room table. Luis closed the door. (T. 2807). Bea was in another chair at

the table. (T. 2808). Bea yelled at Sam not to let Defendant treat him that way and yelled at Defendant that he could not treat her husband that way in his own home. Bea jumped up like she was going to hit Luis. (T. 2809). Luis raised his hand and his elbow hit her face and he pushed her back into her chair. Luis was just warding her off, but the contact was forceful. She stayed in the chair after that. Defendant then gave Luis a pair of rubber gloves that he had in his jacket.[3] (T. 2810). Defendant also put on a pair himself. Defendant commanded Luis to go to the back room and look for money.

Luis went into the bedroom and went through the dresser drawers. (T. 2812-13). In one drawer he found rolls of money taped end to end, each about three inches in diameter. Luis did not scatter anything on the bed at that time. (T. 2814). In the right-hand night stand, he found a revolver. (T. 2815). There were three rolls of money, one of fives, one of twenties and the third was either tens or fifties. As soon as he found the gun, he went back out to the living room. (T. 2816). Luis gave Defendant the money and the gun Defendant had previously given him, keeping the gun he had gotten from the night stand. An argument broke out at that point. (T. 2817). Sam had offered to look for the jewelry Defendant wanted before Luis went into the bedroom. Defendant accused Sam of

[3] The police recovered a fingertip from a latex surgical glove. (T. 1859). The glove tip was found in the hallway between the two bedrooms and the bathroom. (T. 1867).

having wanted to go back and get the gun. (T. 2818). The Josephs were still in their chairs, and Defendant was standing between them. (T. 2819). Defendant then went into the back of the apartment. After a few minutes, there was a knock on the door. Defendant then came back into the living room. (T. 2820). Abraham came in. (T. 2821). Luis did not recall whether he pushed her into the living room chair, but he might have. Abraham offered them her jewelry if they would leave. Sam told her to just cooperate. (T. 2822). She made gestures with her hands to the jewelry. She said "take this, just leave." She was indicating her neck and ears. (T. 2823). Luis was standing behind Abraham and to her left. (T. 2824). The Josephs and Abraham were speaking to each other in a language that was neither Spanish nor English.[4] (T. 2825). Defendant then shot Sam, and then Bea. (T. 2827). Both shots were aimed at their heads. Defendant then pointed his gun toward Luis and Abraham, and said "off her." Defendant waited a couple of seconds and said "do it." Luis became scared, and fired. Luis thought Defendant would shoot him if he did not. (T. 2828-29). His gun was already near the right side of Abraham's head, and he just pulled the trigger without looking at her. (T. 2830). She laid her face down after he shot her. After he shot Abraham, Luis immediately gave the gun to Defendant. (T. 2831). He did not fire a second shot at Abraham. (T. 2846). At that point both Bea and Sam were still sitting at the

[4] The three spoke Arabic. (T. 1760, 1818).

table. They were not moving. Luis fled the apartment. The only things he took were his rubber gloves. (T. 2832). He took them off on the way back to Cookie's apartment.

When he got there, he immediately told her they had to leave. He told her that it had gone terribly wrong. She immediately packed up the baby supplies and they headed out the door to her car, a blue Dodge Aspen station wagon. (T. 2833). He and his ten-year-old nephew sat in the back. Cookie and the baby got into the front passenger seat. They waited a few minutes and Defendant showed up at the car. (T. 2834). Defendant was carrying something under his sport coat. Defendant drove them to Miami Beach, where they stopped at an Amoco where one of Defendant's relatives was the manager. Luis was given a bag with the guns in it and told to dump it in the water there. (T. 2835-37). Luis did not receive any of the proceeds of the crime. (T. 2838). They decided that he should not stay at Cookie's and he walked a block and a half to an old hotel and rented a room. (T. 2839). The next day he flew back to Orlando. (T. 2840). He did not go to the police in 1984 because he was scared. (T. 2845). He was afraid of Defendant. He was still afraid of Defendant in 1993. (T. 2846). They were the only two people involved. (T. 2857).

The day after Luis was arrested, August 4, 1993, the detectives proceeded to Daytona Beach, where they met with Defendant. They told him they wished to speak to him about the murders. (T. 2293-

94). Defendant told them that he had heard that they were contacting his family members and asking questions. He said he had spoken with Cookie the previous afternoon, and that detectives were talking to the family members. There was nothing that seemed odd or unusual about Defendant at the time. They were able to have a logical conversation. (T. 2295). Defendant did not appear drugged or sedated in any way. He did not seem to be intoxicated. He had no difficulty speaking or walking. They spent approximately one hour with Defendant at that time. Then they returned to Miami. (T. 2296).

On August 9, 1993, the police obtained a warrant for Defendant's arrest. On Friday, August 13, 1993, the warrant was executed. (T. 2299). They arrested him around 10:05 a.m., and brought him back to Miami. (T. 2300). Defendant's behavior was in no way bizarre, unusual or strange during the trip. They had normal conversations. The police did not question Defendant about the crimes during the trip. (T. 2302). After they arrived at headquarters, they ascertained Defendant's educational level, whether he was on prescription medication, or other drugs or alcohol, whether he spoke English, whether he could read English. Defendant was read his rights per the form, and he agreed to waive them. (T. 2315). There was nothing strange or unusual about Defendant's conversation. He was coherent. They had no difficulty getting answers from him. They did not resort to any pressure

tactics with him. There were no threats made. (T. 2317). There were no promises made. Defendant was very cooperative during the interview. (T. 3132). Defendant did not appear nervous when they spoke to him. Defendant said the medications he took gave him dry mouth, and made him restless. (T. 3190). However, Defendant was never less than “100 percent normal” in their conversations. (T. 2321).

After waiving his rights, Defendant stated that he lived in the Josephs’ building, in apartment 3, at the time of the crimes. (T. 3124). Defendant shared the apartment with Cookie, their infant daughter, Natasha, and Cookie’s 9-year-old son, Landi. (T. 3128). Defendant claimed that Luis and Isidoro were not trustworthy and were rumored to be criminals. (T. 3129). In his initial version of events, Defendant claimed he was in Homestead stealing fruit at the time of the murders. He left the rest of the family at home in the apartment. Defendant stated that Luis was not there that day. (T. 3130). Defendant stated that he owned a blue Dodge station wagon. In his second version, Defendant asserted that Cookie had bug-bombed the apartment and had left to a place unknown while Defendant went to Homestead. Then Defendant said that the bug bombs were placed in the apartment after he returned from Homestead. (T. 3131). Then they all left because of the fumigation and went and stayed with his mother for the night. Defendant next added that after they left the apartment, they went to the hospital because of

his daughter's heart problem. (T. 3132). Defendant did not mention Luis or Isidoro in this third version. In his fourth version, Defendant asserted that there was a large conspiracy involving the Josephs and the apartment building. Defendant claimed that the doctors who bought the building after the murders had been involved in the crime. Defendant stated that Cookie was familiar with and worked with these doctors. (T. 3133). When informed that Luis had confessed, Defendant came up with a fifth version of the events. (T. 3134). He asserted that Cookie's family did not like him and were lying about him. Defendant conceded that none of his previous claims had been true, and that he had been lying to cover up for Cookie's family. (T. 3135). Defendant now stated that Luis had been at their apartment that day. When told that Isidoro and Cookie had also implicated him, Defendant responded that he had not shot anybody. Defendant repeated at least 20 times, "I did not shoot anybody." That was Defendant's standard response whenever they asked him what actually happened. (T. 3137). When asked what role he played, Defendant responded that he did not go inside. (T. 3138). Defendant then stated that Luis had come down to visit Cookie. Luis needed money, and asked for Defendant's assistance to obtain it. (T. 3139). Defendant stated that he told Luis that the landlords had money. Defendant stated that he had just paid the rent in cash, and the money was probably still in the apartment. Defendant stated that he told Luis he could not go to the apartment

with him because they knew him. Luis told him that all he had to do was help him get inside, and Luis would do the rest. (T. 3140). Luis then, according to Defendant, made a phone call, after which they both headed down to the Josephs' apartment. Defendant claimed that as they were walking to the apartment, Isidoro showed up in a gold van. (T. 3141). Defendant said he knocked on the door, and Sam answered. Then Isidoro and Luis forced their way in, while Defendant remained outside. Defendant then took up a post as a lookout. (T. 3142). Defendant stated that within seconds, he heard gunshots. (T. 3143). Then, after several minutes, Isidoro and Luis came out, and Isidoro left in his van, and Defendant and Luis went back up to Defendant's apartment. Then they woke up Cookie,[5] Landi and Natasha and they all got into the station wagon. (T. 3144). Cookie drove the car to an area by a canal where Luis threw something into the water. Then they drove out to Miami Beach, where they dropped Luis off, and then drove to his mother's house. (T. 3145). At one point during the interview, the phone call Luis made moved from in the apartment to a pay phone a couple of blocks up Bird Road. In this version, Isidoro arrived after the call from the pay phone. Defendant never returned to the bug-bomb story.

[5] There was already no answer at the Joseph's when Nimer called around 8:30 p.m. Additionally, Abraham failed to show up for her 7:30 dinner appointment, contrary to her usually punctual nature. (T. 1761). Also, it was the Joseph's custom to eat dinner at 6:30. (T. 1815). The meal was still on the table when the police arrived. (T. 1826).

Defendant was then booked into jail. (T. 3146).

Isidoro Rodriguez, Luis's older brother, testified that he never stayed with Cookie and Defendant when he visited Miami. In December 1984, his mother called and told him that she was scared, and that he needed to come to Miami. (T. 2432). She was excited and nervous. She said she had found some coins and jewelry in a bag under her trailer. He told her to just hide it, and he would get rid of it when he came down. (T. 2435). Before Isidoro came to Miami, she called again, again agitated. (T. 2436). She said that Defendant and Cookie had shown up looking for it. (T. 2437). He came down on the weekend. He did not see Cookie or Defendant when he was down. (T. 2438). He was aware that there had been a triple murder in Cookie's apartment building. He took the bag from his mother, and took it back to Orlando. He threw the bag from the mother's trailer in a field. He kept one of the coins, which he buried in a planter in his former home. He showed the police where he did both of these things. (T. 2516). Isidoro also presented documentary evidence showing that he was in Orlando working both on the day of the murder, and the following day. (T. 2439-88). Isidoro never owned a gold van. At that time he also had a Ford F-250 pickup, which they would have taken if they went to Miami. (T. 2491-92).

After the murder Elisia Rodriguez, the mother of Luis and Cookie, found a bag under her trailer. (T. 2102). The top of the

bag was rolled shut. She looked inside and saw a watchband and a piece of cardboard with a buffalo nickel on it. (T. 2105). When she found the bag she called her oldest son, Isidoro Rodriguez, in Orlando. (T. 2109). The following weekend Isidoro came to Miami. She hid the bag outside her house until he came, and never looked in the bag again. (T. 2110). Defendant and Cookie then came to her house looking for the bag. They were crouching down looking under the trailer when she saw them. (T. 2111). She came out and asked what they were doing. Defendant became very nervous. (T. 2112). Defendant appeared angry. (T. 2113). Cookie asked her if she had seen the bag. Elisia asked her "what bag?" and denied seeing it. They continued to search for it. (T. 2115). They both kept saying, "I left it here." Eventually, Isidoro came and took the bag, and she never saw it again. Elisia had heard Defendant say he had been in the Joseph apartment. (T. 2116). Defendant had helped Sam fix something. Defendant commented that they had collections. (T. 2117). Luis never came looking for the bag. (T. 2132). Defendant and Cookie were the only ones. (T. 2132). The jury found Defendant guilty as charged on all counts. (T. 3506-07).

In its case in chief at the penalty phase, the evidence the State presented concerned the prior violent felony and under sentence of imprisonment aggravators. Admitted into evidence were more than seventy (70) prior violent felony convictions. In addition to the contemporaneous murders and armed burglary with

assault, Defendant had twenty three (23) convictions of armed robbery, seventeen (17) convictions for armed kidnaping, eight (8) convictions for aggravated assault with a firearm, and numerous convictions for carrying a concealed weapon and possession of a firearm by a convicted felon. (T. 3541, 3543, 3553, 3557, 3561, 3565, 3577, 3580, 3591, 3596, 3600, 3608, 3986, 3994). Also admitted was evidence that Defendant was on both probation and parole at the time of the murders. A chronology follows.

On May 15, 1977, Defendant and a second man entered the DuPont Plaza Hotel in Downtown Miami at 1:30 a.m. They asked a security guard where the cashier's office was, and proceeded as directed to the second floor office. Defendant ordered the clerk at gunpoint to lie on the floor. He then crawled through the service window, and demanded cash, pointing the gun at the clerk's head. (T. 3534-35). After a scuffle, the two fled with $120. The victim was unable to read their tag, because it was covered. (T. 3536-37).

On June 3, 1977, Defendant entered the Zagami Super Market on West Flagler Street in Miami, armed with a semi-automatic pistol, which he pointed at the cashier and demanded money. Defendant fled with $300. (T. 3542).

Defendant was released on parole on February 17, 1981, with regard to the 1977 robbery. Defendant's term of parole was scheduled to end on February 17, 1983. At the time of the murders in this case, there was an outstanding parole violation warrant for

failure to report. (T. 3611). Defendant was arrested on the violation on July 24, 1985. (T. 3613). Defendant was also on probation for the second 1977 case at the time of the murders. When Defendant was arrested for the violation, the parole commission decided to release him from parole since he was only on two years parole, and he had made the restitution that was a condition of his parole. (T. 3618). They were unaware that Defendant had committed further crimes in the interim because he had used false names (15) and birth dates (12). (T. 3619).

On July 8, 1982, the clerk of the U-Totem convenience store located at 10823 Biscayne Boulevard became concerned and called the police because Defendant was loitering in his car outside the store, wearing a coat (in July). (T. 3982). Eventually Defendant came into the store and the clerk saw him remove a gun from his waistband. The clerk then drew his own gun, pointed it at Defendant, and told him not to move or he would shoot. (T. 3983). The clerk detained Defendant until the police arrived. Defendant was arrested for carrying a concealed firearm. (T. 3984). The car Defendant was using had been stolen the previous month. He also charged Defendant with possession of stolen property. (T. 3984). Defendant told the police that his name was Antonio Heres Chait. On investigation it was learned that Defendant had also used the names Anthony Rodriguez Chait and Roberto Chaves. Defendant told the officer his birthday was January 13, 1956. (T. 3985). Defendant

confessed to intending to rob the U-Totem, and that he knew the Celica was stolen.

On December 4, 1984, Defendant murdered and robbed Sam and Bea Joseph and Genevieve Abraham.

On November 22, 1985, Defendant committed a robbery at the Ramada Inn located at 7250 NW 11th Street. (T. 3988). The victims of the that robbery arrived at the Ramada around 10:00 p.m. When they exited their car, Defendant confronted them with a gun and ordered them both back into the car. (T. 3989). Defendant took their jewelry and purses, and then told them that he had an accomplice in another car with a shotgun. He ordered the driver to start the car, and then ordered them out. Defendant then drove their car away, followed by a second vehicle. Two days later the victim saw Defendant at Monty's restaurant in Miami and called the police. (T. 3991). When the police approached him, Defendant fled. After a scuffle, Defendant was arrested. (T. 3993). Defendant's date advised the police that Defendant had picked her up in the vehicle that had been stolen from the Ramada victims. When Defendant was taken into custody, he gave the name Antonio Traves. (T. 3993). He said he was born on December 13, 1955.

On February 20, 1988, Defendant and an accomplice entered a Burger King at SW 8th Street and 68th Avenue. (T. 3546). The two men ordered food. Defendant went behind the counter and produced a stainless steel gun. He ordered everyone to lie down on the floor.

The victims complied. He then pointed the gun at one of the employees and demanded the money from her register, after which he took the manager at gunpoint into the back room and ordered him to open the safe. He took the money from the safe and the manager's Seiko. (T. 3547-48).

On March 17, 1988, Defendant went into a McDonald's located at 901 SW 42nd Avenue and ordered some food. As the attendant was getting his food, Defendant drew a gun on the woman who took his order. (T. 3561-62). It was a stainless steel or chrome revolver. Defendant pointed the gun at her forehead and told everyone to get on the floor. He ordered another victim to open the safe. (T. 3563). They went to the office, where they encountered a third victim who eventually opened the safe when the second woman could not. He took the money in a pillow case he had brought with him and fled. (T. 3564).

On April 30, 1988 Defendant entered a Burger King located at 7360 Coral Way. (T. 3586). He ordered food. When asked to pay, Defendant produced a chrome gun and jumped over the counter. He forced the manager into the back at gunpoint, where he demanded that the safe be opened. (T. 3587). Defendant was very demanding and placed the gun to the manager's head. He also took a watch and personal funds from the manager. He also confronted a second employee with the gun. (T. 3588). In his confession, Defendant stated that he told the victims they would he injured if they did

not cooperate. (T. 3589).

On September 14, 1988, Defendant entered Luna Beds, a furniture store located at 12260 SE 8th Street, and said he needed a medical bed for his ailing mother. He left, and returned later that evening, when he produced a firearm and took jewelry from the husband and wife owners. Then he forced them into a bathroom at the back of the store. The victims described Defendant as nicely attired. (T. 3592-93). He told them he had an accomplice outside with a shotgun. He took an extensive amount of jewelry, valued in excess of $16,000. (T. 3594-95).

On October 5, 1988, Defendant entered the Indoor Gardener florist shop at 7263 SW 57th Avenue, and inquired about wiring some roses. (T. 3596). Later that day he returned, and pointed a chrome gun at the victims, demanding money and jewelry. Defendant was neatly attired. Defendant then forced the victims into the back of the store where he ordered them to remain. (T. 3597). Defendant pointed the guns at their heads, and told them they would be hurt if they did not comply. (T. 3598). Defendant confessed to this crime as well. (T. 3599).

On November 11, 1988 Defendant entered the Fantasy Travel Agency at 10766 Coral Way, and inquired about prices for a group tour he was allegedly arranging, and then returned later in the day. (T. 3601). When Defendant returned, dressed neatly in business attire, he brandished a chrome gun and told everyone to get on the

floor. He ordered each of them to give him money, and also took the victims' jewelry. Then he ordered them all into the rear of the business, and locked them in the bathrooms. (T. 3602). Defendant then fled with the money from the safe, which he put in a bag he had brought with him. (T. 3603).

On November 14, 1988, Defendant entered at a Clothestime store at 8435 SW 24th Street and approached the clerk as if he wanted to buy some clothes. (T. 3557-58). Defendant was clean-shaven and nicely dressed. After inquiring about various items, Defendant then produced a chrome gun and demanded money. (T. 3559). After taking the money from the register, Defendant demanded the personal jewelry from the two young women who worked there. He then ordered them into the bathroom and told them not to come out. (T. 3560).

On January 3, 1989, Defendant returned to the same Burger King on Eighth Street and again ordered food, then went behind the counter, and produced a stainless steel gun. Defendant told the victims to get on the floor and put the money in his bag. (T. 3553-54). Defendant then ordered the manager at gunpoint to open the safe, or he would blow his head off. (T. 3555). The manager gave him the money, and he fled.

On January 11, 1989, Defendant entered the Fabric King store located at 7556 SW 117th Avenue and asked the victims about buying some buttons. He then produced a chrome gun and pointed it at the woman's head and told her to hurry because his accomplice outside

was more dangerous than him. Defendant took the money from the cash drawer, and other items from the purses of the two clerks, and then ordered them into the back of the store and fled. (T. 3577-78).

On January 19, 1989, Defendant entered a Burger King at 12500 SW 8th Street holding a police scanner, produced a chrome gun and pointed it at the victims and demanded money. He then jumped the counter, and forced the manager into the back where the safe was located. Defendant took the money from the safe, as well as the manager's jewelry. He put the items in a maroon bag he had brought with him. (T. 3567-69). After a chase, Defendant was arrested fleeing the scene. (T. 3570). During the robbery, Defendant pretended the scanner was a walkie talkie in an effort to convince the victims that he had accomplices outside. (T. 3571). The gun was fully loaded when Defendant was arrested. (T. 3576).

In mitigation, the defense presented testimony that demonstrated that virtually every time Defendant was arrested, he asserted incompetence. There was absolutely no evidence presented that Defendant ever had any mental health issues at any time while he was at large, however.

The defense called clinical Psychologist Rosalind Pass who examined Defendant on July 21, 1977, in connection with one of his then-pending criminal cases. (T. 3631). Pass concluded in her report that Defendant suffered from schizophrenia, either paranoid or chronic undifferentiated type. (T. 3639). She characterized

schizophrenia as a mental condition where the person could not cope with every day life, characterized by delusions, hallucinations, flat affect, and difficulty distinguishing reality. (T. 3640). Dr. Pass denied that her opinions in 1977 related in any way to his state of mind when he committed the murders seven years later. (T. 3646). She did not know whether Defendant had ever received any psychiatric treatment before she examined him in 1977. Her examination report did not indicate that Defendant suffered from any brain damage, although she tested him for it. (T. 3647). Defendant did not appear retarded. There was no way for her to verify Defendant's claim that he had taken LSD every day for three or four years. (T. 3648). Dr. Pass was asked to look at drawings Defendant had completed for defense expert Dr. Rothenberg in 1991. (T. 3554-56). They appeared to her to have been drawn by a normal person. Her determination of whether Defendant could recall the facts of the crime necessarily depended on his representations to her. (T. 3657). There is no malingering factor on the projective tests. (T. 3658). Therefore she had to take Defendant's claim that he had no idea why he was there at his word. This claim was an important factor in her determination of incompetency. (T. 3659). She was never given the opportunity to review any of Defendant's subsequent evaluations before testifying. (T. 3659).

Psychiatrist Paul Jarret examined Defendant on November 14, 1980, pursuant to a court appointment. (T. 3821). He gave a

complete psychiatric examination “within the limits of [Defendant’s] cooperation.” He concluded that Defendant was grossly disturbed and in a state of schizophrenic psychosis. (T. 3823). He also believed there was an element of malingering as a result of Defendant’s legal troubles. Defendant’s behavior prevented him of reaching a legally defensible conclusion that Defendant was competent to proceed. He was further unable to determine whether Defendant knew right from wrong or whether he understood the nature and consequences of his acts. (T. 3824). Jarret recommended hospitalization for a more reliable determination of Defendant’s past and present (i.e., 1980) mental status. He took Defendant’s history. Defendant stated that he was 25 years old, and that his friends had told him he was born in North Carolina in 1932. He claimed that the year was 1978. He stated, “everything is going to end forever because he can’t stop it any more.” (T. 3825). Asked how long he had been in jail, Defendant stated that he had been at the University of Miami for a year and studied every day. He also averred that what would happen to the world was a secret between Defendant and Jarret. Defendant claimed not to understand the charges against him and said the truth would live forever. He then stated that he came to Miami when he was 25, and would hold power forever. He stated he could not state what his mission was, because it was a secret. (T. 3826). Jarret observed Defendant to be about six feet tall. Defendant claimed to be 6’5”, 6’6” or 6’7”, which

Jarret felt was conscious malingering. Jarret later checked the jail record, and the records did not indicate any psychiatric medications having been administered to Defendant. Some schizophrenics can function effectively with proper medication, but a significant percentage never do. (T. 3832). The court subsequently ordered another evaluation, and Jarret examined Defendant on May 2, 1981. Defendant appeared at that time to be competent. (T. 3838). He recommended that Defendant remain on anti-psychotic medications for the rest of his life. (T. 3840). One of the possibilities that Jarret considered at the time of the first exam was that Defendant was consciously attempting to make himself appear sicker than he was to gain some benefit. (T. 3842). The dissembling about his date and place of birth was an example. In the second interview Defendant claimed to born both in Brooklyn and in Puerto Rico. (T. 3843). People with mental illness generally can recall when and where they were born. Such a lack of memory would not usually be part of a psychosis. Jarret felt Defendant was not being truthful about this. (T. 3844). Jarret explained the concept of “theatrical mistake,” wherein the examinee consciously poses as a person other than themselves. He felt that Defendant’s claims about the University of Miami were theatrical. (T. 3845). It is related to Ganser Syndrome where the subject intentionally gives wrong answers to help themselves. People who do this are usually fairly bright. The syndrome is most prevalent in inmates desiring

to be transferred from the jail to a hospital setting. (T. 3846). Even though Defendant appeared competent at the second interview, Jarret still had the impression that Defendant was malingering. Jarret did not have enough information to determine whether Defendant was antisocial, but he could not exclude the possibility. He did feel it was highly likely Defendant had some type of personality disorder. (T. 3850). A person with a personality disorder, as opposed to a major mental illness, understands "the rules," but will disregard them if they think it is in their own self-interest to do so. (T. 3851). Taking 60 Tylenol 3's would be fatal to most people. (T. 3853).

Clinical psychologist David Rothenberg was appointed by the court to examine Defendant in one of his cases in 1989. (T. 3666). Dr. Rothenberg first interviewed Defendant on February 21, 1989. (T. 3667). He concluded Defendant suffered from a major mental illness, hallucinogen abuse. Defendant reported seizure problems, and Rothenberg observed paralysis and tremors in Defendant's right hand, which Defendant described as a neurological problem. Defendant stated that he felt very bad, like someone was going to him over and he would be crazy. Because of the intensity of Defendant's complaints, the interview was terminated at that time. (T. 3669). Rothenberg advised the court that he did not think Defendant was competent to proceed. (T. 3670). He conceded the shaking and paralysis could have been faked. Rothenberg was

appointed again and saw Defendant on March 21, 1990. (T. 3671). It was again impossible to conduct any evaluation, because Defendant was in a semi-stupor state. He claimed not to know what the charges were against him, how long he had been in jail, or what the possible of the charges consequences were. In his report Rothenberg opined that Defendant continued to be incompetent, and that he should be again hospitalized. (T. 3675). He next saw Defendant on September 17, 1990. Defendant described a hallucinatory experience. He requested that he be returned to the hospital. Rothenberg concluded that Defendant was of average intelligence, and suffered from an organic personality disorder that was at that time in remission. He again concluded that Defendant was not competent to stand trial, because he had no knowledge of the judicial process, or the charges against him, or their consequences. It was possible he could have been malingering to avoid trial. (T. 3677). Rothenberg next evaluated Defendant on January 5, 1991. At that time he found him to be competent to stand trial. Defendant was administered the person drawing test. (T. 3679). The test indicated that Defendant had an adequate perception of reality. (T. 3680). The testing indicated that Defendant was competent. (T. 3681). The doctor was asked about the fact that a month before Rothenberg's first interview, Defendant was able to discuss crimes he had committed in March, April, and October of 1988, in great detail, including his plan and actions, on down to the street addresses of

the McDonald's and Burger Kings he robbed. It was also pointed out that Defendant gave detailed descriptions of the victims at the flower shop he robbed, down to only taking one earing. (T. 3691-92). The doctor did not find this inconsistent with Defendant's claims a month later. (T. 3693). Rothenberg discounted the fact that Defendant told the police when he was arrested (red-handed) that he was not under the influence of drugs, alcohol, or medication, and the police observation that Defendant appeared sober and normal, and not suffering from any mental health problems: "You know he is telling different stories at different times." (T. 3695). Defendant also claimed that he took 60 Tylenol 3, which contained codeine, a day. A person who took that many would probably be totally incapacitated. A person taking that much probably would not even be able to move. "It [would be] a stretch of the imagination" to believe that Defendant could have developed a tolerance to such a quantity, in the doctor's words. (T. 3697). Rothenberg did not believe Defendant was schizophrenic. He did not believe Defendant suffered any intellectual deficit. His testing showed him to be of average intelligence. (T. 3702). The drawing indicated a high level of intelligence. It was possible Defendant was withholding in terms of his memory. He was able to tell Rothenberg the name of the doctor who was treating him at the hospital that he liked. (T. 3703). Rothenberg had never reviewed any of the other evaluations of Defendant, or any of the police

reports. (T. 3704). The doctor had no way of knowing what Defendant's mental state was at the time of the murders; that would be "conjecture." (T. 3705).

Clinical psychologist Joan Tarpin worked at the South Florida Evaluation and Treatment Center while Defendant was resident at that facility from March through August of 1989. At the time Defendant was facing charges for, inter alia, kidnaping, robbery, and aggravated assault. (T. 3736). His admitting diagnosis was "Other Psychoactive Substance Hallucinosis." In other words, he was suffering from hallucinations brought on by substance abuse. Defendant was also diagnosed as having a seizure disorder, by history. (T. 3739). She felt he was incompetent due to anxiety, and his refusal to work on competency material. He had a lot of physical problems but seemed very aware of what was going on around him, and was able to have conversations. The question of malingering was "raised a number of times, but was never answered." (T. 3741). Defendant's admitting diagnosis was possible schizophrenic disorder, possible substance-induced delusional disorder, codeine dependence, mixed substance abuse, and seizure disorder by history. This was later changed to the hallucinosis diagnosis noted above. (T. 3742). The "by history" qualifier meant that it was based on what Defendant told them. (T. 3745). Tarpin did not believe that Defendant was schizophrenic. (T. 3746). She would have no idea what Defendant's state of mind was in 1984.

Defendant was given an EKG, and a CAT scan, which came back negative, indicating that there was no brain damage or dysfunction. (T. 3747). She noted in her report that Defendant did not appear motivated to help himself. If a person does not want to participate in the programs at the Center, it would delay their return to court for trial. (T. 3748). Defendant usually had a good memory for details. The only thing he could not remember was the events of the crimes with which he was charged. (T. 3750). It was not consistent with any documented type of amnesia. Defendant's intelligence appeared to be average or above average. (T. 3751). She never noted any bizarre behavior on Defendant's part. He had suicidal ideation, based on self-report. He never made any suicide attempts while on Tarpin's ward. She was aware of an incident where he had to be restrained once on another floor for head banging. (T. 3753). This apparently occurred after Defendant was moved to that floor for an attempted escape. (T. 3754).

Clinical psychologist Gerard Garcia also worked at the South Florida Evaluation and Treatment Center. (T. 3758). Defendant was committed on March 22, 1991, with a diagnosis of schizophrenia, undifferentiated chronic type, possibly with malingering. (T. 3762). The diagnosis was based on bizarre hallucinations and delusions. (T. 3763). Defendant claimed that he heard messages from the television and voices that told him to hurt himself, and that he thought others were out to get him also. (T. 3764). They found

Defendant competent in August 1991. (T. 3766). Defendant was discharged with the diagnosis of schizoaffective disorder, which is a combined thought and mood, i.e., depressive disorder. (T. 3769). Dr. Garcia stated that schizophrenia is a disorder that is life-long. If it had been diagnosed in 1977, it would last through 1989. (T. 3770). A schizophrenic can function without delusions while on medication, but if he stops taking it, he would become psychotic again. (T. 3771). Psychosis would return without medication in 99 percent of cases. (T. 3773). He did not feel Defendant would continue to be competent if he stopped taking his drugs. (T. 3774). The usual course of schizophrenia is to become progressively worse. Schizophrenics' hygiene is usually poor. (T. 3776). Garcia did not know if Defendant had ever had any alleged psychotic episodes not associated with an arrest. Defendant was always neatly dressed. He never got into any physical altercations. His appearance and clothing were appropriate. (T. 3781). Defendant was of "at least" average intelligence. His brain scans turned out negative. Defendant was not retarded in any way. Garcia had no idea what Defendant's state of mind was at the time of the murders. (T. 3782). Garcia would have been surprised to learn that Defendant did not become psychotic while living at large and functioning for many years without medication. (T. 3783). He did not think that Defendant would have been taking good care of himself, and would have been delusional. (T. 3787). Garcia could not say without

further discussion with Defendant whether he could be suffering from this disease and also taking large quantities of Tylenol 3, LSD and crack, and still plan Defendant's 1988-89 crimes. It would be "extraordinary" if anyone built a sufficient tolerance to take 60 Tylenol 3's and still drive around town planning crimes. (T. 3791).

Defendant also called three family members. Defendant's first cousin, Mirka Dessel-Jaffee, testified in regard to one occasion when Defendant was overmedicated while he was at the South Florida Corrections Mental Institute in 1977 or 1978. (T. 3720-26). Between that visit and trial, she saw him once -- when his daughter died in 1984. (T. 3727). Defendant's sister Anna Fernandez testified that Defendant's family came to Miami from Cuba in 1966 when he was about nine years old. (T. 3858-59). Defendant lived with their mother and aunt and another sister. (T. 3860). Their mother worked as a cook to support her family. (T. 3861). Later, Defendant began to hang around with the wrong people and got into trouble. (T. 3862). Defendant was first arrested for stealing cars when he was a teenager. (T. 3872). Fernandez later visited Defendant was he was in the South Florida Mental Hospital in relation to his criminal cases in 1977 or '78. (T. 3873). She did not see Defendant again after that until 1984, when he came to visit her once. (T. 3876). She next saw him when she visited him in prison in 1990. (T. 3877). When she visited Defendant in 1990, he appeared physically

all right, but was very nervous and anxious. Their sister Frances was the one that was with Defendant when he was arrested for the robberies. (T. 3879). She did not learn about Frances being involved until a few days before she testified. She tried to keep her family insulated from Defendant's legal troubles. (T. 3882). When their mother found out that Defendant had been arrested again in 1993, she tried to kill herself again. (T. 3883). Their mother never treated them badly. They never suffered from abuse or deprivation as children. (T. 3884). Fernandez did not know there was an outstanding parole violation warrant for Defendant in 1984. She did not see Defendant at all between 1986 and 1989. (T. 3887). She did not know Defendant had been involved in the murders until she read about his conviction in the paper at the conclusion of the guilt phase. (T. 3888). Another sister, Mayra Molinet, related essentially the same family history as Fernandez. (T. 3891-97). Molinet left home and got married in the late 1970's. She did not see as much of Defendant after that. (T. 3899). In 1976, she returned and lived with Defendant and her sister Frances in a drug den. She moved out shortly, and next saw Defendant when he was in the hospital at the time of the incident described by Dessel-Jaffee. (T. 3900-02). She next saw him in the early 1990's, again in the hospital. (T. 3904). Defendant was a great uncle to

Fernandez's children.[6] She confirmed that their mother never neglected them. She made sure they went to school, and that they ate. She always provided for them, even through her illness. (T. 3921). She went to court with Defendant when he was a arrested as a juvenile. Her aunt was also always very generous with them. Molinet also found out about Defendant's involvement in the murders in the paper. (T. 3923). She did not visit Defendant and Cookie much because they usually had drugs and she was trying to get away from that at the time. (T. 3932).

In rebuttal, the State called Psychologist Leonard Haber who had been appointed to examine Defendant with regard to one of his cases in 1989. He examined him on February 17, 1989. (T. 4025). Defendant asserted that had used LSD twice three years earlier. He denied any habitual use. Defendant denied memory of any of the crimes with which he was charged. (T. 4027). He was nevertheless able to provide Haber with the personal information about where he lived, places he had worked, schools he had gone to, etc. Absent head trauma at the time of the "forgotten" event, Haber was aware of no psychological syndrome that would explain such selective memory loss. (T. 4028). Defendant's highly detailed and corroborated confessions three weeks earlier were wholly inconsistent with Defendant's professed lack of recall. Most likely

[6] Although he apparently got Cookie's son, Landi, involved in criminal activities while Landi was still a teenager.

he was lying to Haber. Haber saw Defendant a total of five times. (T. 4029). Haber next saw Defendant on March 29, 1990. Defendant again denied knowledge of the charges. Haber next saw Defendant on September 12, 1990. Defendant was again unable to articulate the charges against him. Defendant told Haber at that time that he wanted to go back to the hospital. Haber next examined Defendant on January 22, 1991. (T. 4030). Haber indicated a potential diagnosis at that time of schizophrenia, paranoid type. That diagnosis relied on self-report by Defendant. (T. 4031). Haber saw Defendant again in March 1991. Defendant at that time stated he was facing charges of kidnaping and armed robbery, but still disclaimed any knowledge of the details. Haber later interviewed Defendant on January 25 and March 16, 1992, at the State Hospital at the request of defense counsel. He noted that the hospital records reflected a concern that Defendant was malingering. (T. 4032). The Bender drawing test Defendant completed on January 7, 1991, did not evince any brain damage or dysfunction. It did not show any possible brain damage from drug abuse. He would probably not think, based on this test result that additional testing for organicity would be required. (T. 4038). It would have been very important information in determining Defendant’s understanding of the judicial process and the possible consequences of the charges to know that Defendant had previously been involved in numerous cases involving similar charges that were decided adversely to him. (T. 4058). Haber never

saw any objective evidence of Defendant experiencing hallucinations. (T. 4059). Haber had no way of knowing what Defendant's mental state was at the time of the murders. (T. 4060).

Psychiatrist Charles Mutter was asked by the State Attorney to examine Defendant in 1977. He saw Defendant on August 11, 1977, for the purpose of determining whether he was schizophrenic. Defendant had already been determined to be incompetent and had been committed to a mental facility at that time. Mutter diagnosed Defendant as suffering from a drug psychosis. (T. 4100). He felt that schizophrenia should be ruled out. Mutter felt that Defendant showed signs of that disorder and recommended in-patient evaluation to determine whether he in fact was schizophrenic. However, Defendant's symptoms were exaggerated, and he suspected malingering. He had difficulty conducting the examination at that time. In later examinations, Defendant did not exhibit symptoms of schizophrenia, and was clearly malingering. (T. 4101). Mutter later concluded that Defendant had "fooled" him in the initial interview, and he altered his opinion. (T. 4102). Mutter reviewed the reports of the other doctors who had examined Defendant over the years. (T. 4104). He went over the reports of Drs. Rothenberg, Castiello, Jarret, Jaslow and others, and noted that a number of them felt Defendant was faking, while others concluded he suffered from a major mental disorder. Mutter examined Defendant on November 18, 1980. (T. 4104). He concluded at that time, after doing a mental

status examination that there was evidence of a recurrence of psychotic process, i.e., signs of decompensation, but that there was also evidence of malingering. He concluded that Defendant was very dangerous, and recommended that he be observed and reexamined very carefully. (T. 4105). Mutter prepared reports in 1977, 1978, 1980, and 1981. He also examined Defendant in 1991. Mutter felt based on the previous examinations combined with the subsequent ones, he might be able to offer an opinion as to Defendant's mental status at the time of the crimes. In 1981, Mutter really felt that Defendant was faking. He also felt that Defendant knew what was going on and knew right from wrong in 1991. He felt that even more important than his examinations of Defendant was the "fact pattern." (T. 4106). He explained that if a psychiatric conclusion was inconsistent with the facts, it was not worth much. (T. 4108). He did not feel Defendant's apparent motivations, planning and carrying out of the murders in this case were consistent with his claimed mental illness. When Mutter examined Defendant after his arrests in 1990 and 1991, Defendant claimed amnesia as to the crimes, was very evasive, and at times claimed he did not know his attorney, etc. (T. 4108). He thought Defendant was malingering in that regard. Mutter did not believe that a schizophrenic would usually have the ability to plan the types of robberies that Defendant committed in the late 1980's. (T. 4110). Schizophrenics are usually disorganized and cannot think clearly. Defendant's

behavior in these robberies was wholly inconsistent with schizophrenia. Mutter explained that there was a psychiatric term that explained why Defendant could not recall the facts of the crimes two weeks after he had given detailed accounts of them to the police. The term was “lying.” (T. 4111). There was also nothing in Defendant’s medical record that would explain his inability to recall his name, date or place of birth or differing explanations of the circumstances of the crimes. (T. 4112). Such a claim would usually be malingering, unless the person had frank organic brain damage. Defendant had no indications of brain damage; all his brains scans and projective tests were normal. (T. 4113). Mutter’s last diagnosis of Defendant was that he was anti-social. (T. 4116). Defendant’s telephone call in which he solicited Luis’s involvement in the crime, and specifically described Luis’s role as that of a lookout demonstrated both Defendant’s ability to plan and his awareness of the consequences of his acts as well as his understanding of right and wrong, all of which were inconsistent with mental illness. (T. 4116). Defendant’s plan of getting past the Joseph’s security with the hostage story was also evidence of goal-oriented planning and inconsistent with schizophrenia. The use of the rubber gloves was also inconsistent with schizophrenia, because a schizophrenic would not believe he was doing anything wrong, and would not take steps to avoid being identified. (T. 4118). The second shots to each of the Josephs, to make sure they

were dead also demonstrated an organized individual, still intent on avoiding discovery. (T. 4119). Defendant's telling the police in 1985, a year after the crime, of the specific time it occurred showed that he did not suffer any memory losses. It corroborated his conclusion that Defendant was lying about his memory losses. (T. 4120). That he was willing to try to trade information with the police was also inconsistent with any claimed mental illness. There was no evidence that Defendant was unable to conform his behavior to the requirements of the law at the time of the murders. Nor was there any evidence that Defendant was under the substantial domination of another or under the influence of any extreme mental or emotional distress at the time of the murders. (T. 4121). Dr. Mutter believed that the facts of the crime were the best evidence of Defendant's mental state in 1984. Defendant's steps to dispose of the murder weapons was also significant in that it showed that Defendant was aware that what he did was wrong, and what the consequences would be if he was caught. (T. 4122). There was no evidence that Defendant was suffering from any major mental disorder in 1984. (T. 4123). Most schizophrenics require treatment their entire lives. (T. 4136). Some can function normally on medication. What would happen when they went off their medication would depend on how much stress they were exposed to. (T. 4136). Schizophrenics are very sensitive to any kind of stress. Normal stress of daily living could cause them to decompensate. (T. 4137).

His 1981 report concluded that Defendant was malingering. (T. 4137). At that time Defendant was on 50 mg Vistaril daily. Mutter was surprised at that because Vistaril was not usually used for major mental disorders, but Defendant was very much intact at the time. (T. 4139). Mutter reviewed the records of everyone known to have examined Defendant, as well as hospital and HRS reports. (T. 4143). Defendant was not evaluated by anyone between 1981 and 1989. There was absolutely no evidence as to whether Defendant needed or was on medication during that time period. (T. 4144).

The State also called Donald Larned, who was the senior psychologist at Tomoka Correctional Institution in Daytona Beach. (T. 3995). Tomoka had an outpatient psychiatric facility. (T. 3998). Defendant arrived at Tomoka on July 29, 1993.(T. 4000). After Defendant complained to his case manager about feeling "edgy," Larned examined him on August 3, 1993. He was not aware at the time that Defendant had just heard from Cookie that he was being investigated for the murders. (T. 4002). Defendant was upset because he had been placed in confinement. If the police had informed the prison personnel that Defendant was suspected of a triple murder, placing him in confinement would have been normal. Larned explained to Defendant the appropriate procedures for appealing the confinement, and Defendant calmed down. (T. 4003). Defendant did not appear to have anything psychologically wrong at the time. He did not exhibit any symptoms of any mental disorder

and denied any suicidal or homicidal ideation or hallucinations, and his cognitive processes appeared intact. (T. 4004). Defendant subsequently claimed to be suicidal. (T. 4006). Normally when an inmate made such a claim, they would be placed in an observation room. (T. 4007). They did not have one available at the time, so Defendant was maintained in confinement with one of the psychological staff present. Defendant was maintained in this status from August 6 until August 9, 1993. Notations were made as to Defendant's behavior every fifteen minutes during that entire period. (T. 4008). Defendant's behavior was normal throughout. Larned interviewed Defendant on August 9, and Defendant told him that he was not suicidal. He stated that he had claimed that because he was angry about being placed in confinement, and thought the complaint would get him released. (T. 4009). His primary complaint was that he no access to a phone in confinement and could not call his family and friends. (T. 4010). Larned would characterize Defendant's behavior at that time as malingering. (T. 4012). During the time he was at Tomoka, Defendant never exhibited any problems that would suggest any mental disorder. (T. 4013). Defendant was being administered anti-depressants when he arrived at Tomoka. (T. 4014).

The jury retired to deliberate at 5:32 p.m. (T. 4317). At 6:50 p.m., it recommended, by a vote of 12-0 as to all three victims, that Defendant be sentenced to death. (T. 4322-23).

The trial court subsequently found the following aggravators: (1) under a sentence of imprisonment; (2) prior violent felony; (3) during a burglary; (4) avoid arrest; (5) pecuniary gain; and (6) CCP. (R. 1739-60). The court gave great weight to all the aggravators, except the prior violent felony factor, to which it gave "very" great weight. In mitigation the court found that Defendant's mental health problems were entitled to some weight as non-statutory mitigation, (R. 1784), that his drug abuse was entitled to substantial weight, (R. 1785-86), and that Defendant's alleged compassion to others, etc., which had not been argued by Defendant, but which the court gleaned from the record, was entitled to "minimal" weight. (R. 1788). The court concluded that the aggravation "clearly and remarkably outweigh[ed]" the mitigation, and felt that even without the CCP and/or avoid arrest factors, that death was the appropriate sentence. (R. 1789). Defendant was therefore sentenced to death as to Counts 1-3, and, based on the unscorable nature of the capital felonies, to a departure sentence of life, with a three year minimum mandatory, on Count 4. (R. 1790-91).

This appeal follows.

SUMMARY OF THE ARGUMENT

1. (i) A State witness did not improperly comment on Defendant's silence where Defendant did not invoke his right, but simply became ill, at which point the interview was terminated.

The claim is also not preserved, and any error would be harmless where Defendant gave numerous statements to the police, both before and after the incident in question, and ultimately inculpated himself as a principal in the crimes. (ii) The prosecutor's notation that none of the evidence or witnesses supported the defense's theory of the case was proper closing argument.

2. Defendant's unpreserved claim that the trial court properly sustained the State's Neil challenge is also without merit where the record supports the trial court's conclusion that the defense's reasons for the strike were pretextual.

3. The trial court properly allowed a State peremptory over a defense Neil objection where the reasons given were neutral and supported by the record.

4. (i) Where defense's entire case was that State witness had manufactured case against Defendant out of irrational animosity toward him, and insinuated on cross of several witnesses that witness was lying and did not fear Defendant, and that Defendant was nice, warm, person, State properly rebutted these claims on redirect. (ii) Defendant's unpreserved claim that witness improperly referred to police ID number was, if error at all, harmless where reference was extremely brief and never mentioned again. (iii) By failing to allow a simple one-question clarification when a State witness mistakenly stated that Defendant had ten, rather than two, aliases, Defendant has waived the issue.

(iv) In any event all three of these claims are harmless.

5. No error occurred in allowing the State to elicit hearsay evidence during the penalty phase where the defense had deposed the declarant before trial, knew of the content of the statement, and the declarant was available to testify, and the defense chose not to call the declarant, cross-examine the witness who related the statement, or present any other evidence in rebuttal of it, despite citing witnesses that could do so, and any error would be harmless.

6. No reversible error occurred in sustaining a State objection to Defendant asking his expert whether he knew right from wrong when moments later she opined that he did not, without objection from the State.

7. The trial court did not err in separately finding the pecuniary gain and burglary factors where it based them on different aspects of the offense; any error would be harmless.

8. The trial court properly found the CCP factor where the evidence showed the victims were well-known to Defendant and not a threat, and he nevertheless procured a weapon and means to avoid leaving identifying evidence at the scene in advance; any error would be harmless.

9. As with the CCP claim, the evidence also supported finding the witness elimination aggravator; any error would be harmless.

ARGUMENT

I.
NEITHER DETECTIVE VENTURI NOR THE PROSECUTOR IMPROPERLY

COMMENTED ON DEFENDANT'S RIGHT TO SILENCE.

Defendant's first claim is that a State witness commented on Defendant's invocation of his right to silence, and that the prosecutor also commented on Defendant's right to silence in closing. Defendant fails to note that Defendant did not exercise his right to remain silent, but rather provided the police with numerous contradictory versions of the crime. Moreover, the defense did not contemporaneously object to the detective's testimony, which was not fairly susceptible of being interpreted as a comment on Defendant's invocation of his right to silence, even if it were found that the right was invoked. Likewise, the prosecutor's wholly unrelated closing remarks were not preserved for review, fair comment on the evidence, and invited by the defense. These claims are without merit. Finally even if any error occurred, it would be harmless beyond a reasonable doubt.

1. Venturi's Testimony The murders occurred in December 1984. Detective Venturi testified that in July 1985, Defendant, identifying himself as Antonio Chait, requested a meeting with the police on July 4, 1995. (T. 2177-79). Defendant gave them information about the crime, which proved false. (T. 2180-81). In November 1985, Defendant again contacted the police, this time identifying himself as Antonio Traves. (T. 2182). Defendant conceded that the previous information had been false, but stated that he needed Venturi's help, for which he would gave him

information. (T. 2183-86). A few days later, they met with Defendant again after determining the second story to also be unverifiable. (T. 2187). They informed Defendant that they believed he was involved, and read him his rights. (T. 2188). Defendant agreed to speak to them and Venturi informed Defendant that he believed Defendant was involved in the crime. Defendant stated that he knew the Josephs, that he sometimes did work for them, and that Sam was a very stingy person. (T. 2192). Venturi asked Defendant whether, having already given two false versions of the crime, Defendant would tell him what really happened, and what his role in the murders was. At that point, Venturi testified that Defendant bowed his head and began to cry, and began to get sick, so they ended the interview. (T. 2193). By sick, he meant that Defendant began shaking, and said that he was epileptic and that it was from his medication, so they terminated the interview. (T. 2394). Defendant was released, and not arrested until eight years later, in August 1993. As noted in Defendant's brief, (B. 50), Venturi specifically testified that they ended the interview because Defendant was sick. After this testimony, the prosecutor went on to other subjects, and completed the direct examination of Detective Venturi. (T. 2194-96). The judge then ordered a fifteen-minute recess. (T. 2194). There was a discussion about the scope of cross-examination. (T. 2196-98). The recess was taken. (T. 2199).

After the recess, the defense broached the issue of the alleged

comment on silence[7] for the first time. (T. 2199). The court's offer of a curative instruction was declined at that time. (T. 2200). The court then suggested that the State could have the officer clarify that the examination was terminated because the Defendant was in distress. Counsel responded that would "magnif[y]." (T. 2200). The court then again offered a curative, which the defense rejected as a comment on the evidence, and would call attention to the matter. (T. 2201). The court then noted that although it felt the comment was improper, it did not rise to the level of a comment on silence, because it was followed by the statement that the interview was terminated because Defendant was not well. The court therefore found that "the detective himself cured any taint or -- reference." (T. 2201). Defendant was eventually arrested in 1993, at which point, after properly waiving his Miranda rights, he gave several versions as to his whereabouts on the day of the crime. He ultimately admitted to being involved in the crime, but denied participating in the shootings.[8]

The State submits that by failing to interpose a timely contemporaneous objection at the time the alleged error occurred,

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[7] The defense also raised for the first time its claim about the alleged collateral-crime reference addressed at Point IV-2, infra. Counsel averred that he had waited because he did not wish to interrupt the proceedings at the time. The record reflects, however, that counsel raised multiple objections during the course of the State's examination of Venturi. (T. 2173, 2180, 2192). One of these objections was after the testimony in question. (T. 2195).

[8] See supra, at 15-18.

when it could have been cured without emphasizing it, Defendant has waived the right to object to this comment on appeal.

Even if this issue could be deemed properly preserved, the detective's comment, taken in context, is not "fairly susceptible" of being viewed as a comment on Defendant's exercise of his right to silence. Although the detective used the term "silence," it was in description of Defendant's actions, made in conjunction with his description of Defendant's sudden illness. This answer was immediately followed by testimony that the reason the detective terminated the interview was that Defendant had become ill. The follow-up emphasized that Defendant was unwell and that for that reason the interview ended. As the trial court noted, the detective's clarification that removed any suggestion that Defendant had invoked his right to silence. Moreover, Defendant's admission to being present at the crime in his subsequent statement renders it extremely difficult to see how the jury could make any inference that Defendant was guilty because he refused to talk to the police. Cf. San Martin v. State, 705 So. 2d 1337, 1346 (Fla. 1997)(testimony that defendant refused to give a recorded statement was not a comment on silence where defendant did not invoke right to silence, particularly where he gave additional statements on subsequent occasions).

Even if the testimony were error, it would be harmless beyond a reasonable doubt. The only surviving witness to the crime, Luis

Rodriguez, testified at length as to Defendant planning and execution of the crime. His testimony was corroborated in several respects by the forensics evidence and by prior consistent statements. Defendant repeatedly contacted the police, gave them false names, and gave them false leads in an effort to draw the blame away from himself. Then when he was arrested nine years after the crime, he again gave the police several "alibis,"[9] but then confessed that he had helped Luis gain entrance to the Josephs' apartment for the purpose of robbing them, although he denied participating in the killings. This version of the crime was inconsistent with other evidence presented. Shortly after the crime, Defendant came looking for a bag he had left at his wife's mother's home. The bag contained items similar to those missing from the Joseph home. In view of this evidence, there simply is no possibility that this brief comment, made in the course of a guilt-phase trial that spanned seven days of testimony, could have contributed to the jury's verdict.[10]

2. Closing Argument Defendant asserts that the prosecutor's comments regarding the absence of evidence that anyone

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[9] Notably, these alibis were inconsistent with those offered by his wife at trial.

[10] Although Defendant has paired this claim with the contention that the State commented on his right to silence in argument, the remarks cited did not address this testimony in closing. The comments Defendant claims were error, which were in fact proper, as discussed infra, were wholly unrelated to Venturi's testimony.

other than Defendant and his codefendant Luis committed this crime amounted to a comment on his right to silence. The record reflects, however, that part of this claim was not preserved below, and that these comments were proper comments on the evidence, and/or fair reply.

Defendant's entire theory of defense was that there was no credible evidence tying him to the murder, and that Luis fabricated all the proof of Defendant's involvement. Counsel expounded, at length, on this theory during opening.[11] At trial, however, the only testimony that Defendant was not present came from Defendant's former "wife," Cookie, who testified that at the time of the crime, Defendant was with her and their children at their annual commemoration of her father's death at the Enchanted Forest.[12] This claim, however, was contradicted by Defendant's own confession wherein he ultimately[13] admitted being present at the scene,[14] by the testimony of Cookie's family members who denied that they ever commemorated their fathers death by going to the Enchanted Forest,

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[11] See Point IV, infra.

[12] The Enchanted Forest is an annual Christmas fair held at Tropical Park in Miami.

[13] In none of his many previous versions did Defendant ever claim he was with Cookie at the Enchanted Forest.

[14] Defendant's claim in his "confession" that Luis's brother Isidoro was involved was refuted by documented alibi evidence, along with evidence that he had never owned a vehicle such as the one Defendant claimed he was driving at the time of the murder.

and by her own prior statements in which she alternately swore that Defendant was involved and that they were elsewhere. There was absolutely no testimony from any witness that Luis fabricated Defendant's involvement, and indeed Luis's version of events was supported by his own prior consistent statements and was consistent with the forensic evidence. Nevertheless, counsel continued to sing the same song in closing.[15] (T. 3280-88).

Given the tenor of the defense presentation, the prosecutor's observation that the jury "hadn't heard in any of the arguments ... what the theory is of who that second person could have been," (T. 3305, B. 53), and his notation that "there was nothing in the direct or cross examination of any witness who testified that pointed to any other person than Luis Rodriguez and this defendant," (T. 3316, 53), were fair comment on the evidence and fair response to defense counsel's assertions.

In Dufour v. State, 495 So. 2d 154, 160-161 (Fla. 1986), this court held that virtually identical comments[16] were not improper: "[f]ar from commenting on appellant's failure to testify, . . .the statement merely permissibly commented on the evidence," and

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[15] Defendant preceded the State in presenting closing argument.

[16] The prosecutor in Dufour argued, "Nobody has come here and said, [the witness]'s testimony was wrong, or incorrect" and that "you haven't, number one, heard any evidence that Donald Dufour had any legal papers in his cell with him." Dufour, 495 So. 2d at 160.

"merely referred to the lack of evidence on the question," and as such, "fell into the category of an 'invited response' by the preceding argument of defense counsel concerning the same subject." See also White v. State, 377 So. 2d 1149, 1150 (Fla. 1980)("You haven't heard one word of testimony to contradict what she has said, other than the lawyer's argument," was "proper" reference to the evidence, or lack thereof, before the jury). Here the State was clearly, and properly, pointing out that there was absolutely no evidence supporting the argument of counsel that Luis had fabricated Defendant's participation.

In the first comment that Defendant cites as improper, the prosecutor merely pointed out that there was simply no evidence that anyone other than Defendant and Luis were in the apartment at the time of the murders. Although the judge sustained the objection,[17] the State submits the comment was proper. That the prosecutor was just pointing out the evidence is borne out by his (unobjected-to) comment immediately following:

> There were two guns. There were two people involved in this and there was not one single iota, not one single drop of proof, not one single testimony of any person through this witness stand other than this defendant was that second man.

(T. 3306).

As to the second comment, Defendant did not assert that it was

[17] At the subsequent motion for mistrial, the court rejected the defense contention that the statement was a comment on silence. (T. 3311).

a comment on silence at trial, and may not now assert that it was error on that ground. San Martin, 705 So. 2d at 1345. In any event for the reasons discussed above, it was likewise properly overruled.

Finally, even if these comments were improper,.they were brief, and came in the course of a several-hour closing that covered more than one hundred transcript pages, and was devoted overwhelmingly to the enormous quantity of evidence produced through 22 witnesses at trial. The isolated nature of the comments, in view of the evidence discussed with regard to part one of this argument, supra, could not reasonably have affected the jury's verdict. As such any error must be deemed harmless beyond a reasonable doubt.

II.

DEFENDANT'S CLAIM THAT THE TRIAL COURT'S ERRONEOUSLY REFUSED TO ALLOW A PEREMPTORY CHALLENGE IS UNPRESERVED AND WITHOUT MERIT WHERE THE REASON GIVEN WAS PRETEXTUAL.

Defendant contends that the trial court erroneously refused to accept a defense peremptory challenge against potential juror Borges. This claim is unpreserved, as the arguments Defendant presently advances were never made below. Moreover, the claim is also without merit where the trial judge's ruled that the reason given by the defense was pretextual. The court's ruling is supported by the record which reflects that at least three other similarly situated jurors were not challenged by the defense.

Defense counsel sought to exercise a peremptory challenge on Borges. (T. 1645). The State objected, identified Borges as a

"latin male," and stated that there was improper bias or prejudice because Borges's responses did not reflect any reason for striking him. Id.[18] The trial judge asked the defense to articulate its reasons for the strike. Id. Counsel stated that Borges had a prior arrest for carrying a concealed firearm, "for which he went through some sort of a program, which I assume he would have been referred by the State Attorney's Office. And as a result of his going through that I believe will feel the State Attorney's office had helped him in the case." (T. 1645-46). The prosecution responded, "[t]here are other people who have been involved in arrests both themselves and their family members who are still among us." (T. 1646). The prosecutor further noted that Borges had not been asked about whether the State Attorney's Office had anything to do with any program, or about what his feeling toward the State Attorney's Office were. (T. 1657). Defense counsel made no further arguments in response. Id.

The record supports the State's argument below. Borges stated that he had been "arrested before but never convicted," on charges of carrying a firearm in his car for protection. (T. 1286). At no point during the voir dire was Borges ever asked how the charges were resolved -- whether the charges had been dropped, whether

[18] Immediately prior to this challenge, the defense had exercised a peremptory strike on another latin male, Deleon. The State objected, but the strike was allowed by the trial judge. (T. 1643-44).

there was an acquittal after trial, or if Borges had entered into any program in return for the charges being dropped. Nor did Borges volunteer this information, either. Contrary to defense counsel's proffer to the trial judge, Borges never mentioned entering into any "program," with or without the assistance of the State Attorney's office.[19] Nor did Borges ever indicate that he felt any gratitude towards the state attorney's office as a result of any such program. Moreover, as noted by the prosecutor, at the time of Borges' challenge, there were three other potential jurors, who had also been arrested but not convicted who remained in the venire pool. Alfred Arzuaga had been arrested, but the charges were dropped after he completed an educational program. (T. 730, 831-2). Hugh McGhee, who stated he had "[o]nly been arrested but they didn't lock [him] up. They took [him] for a traffic violation -- they only took [him] in." (T. 1283-85). McGhee also stated that he had gone through a "bench trial," without mentioning the results. Id. Brian Strachan had been arrested, but "[a]ll charges were dropped before trial." (T. 1306).[20]

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[19] The only mention of any "program" was by another potential juror, Alfred Arzuaga. The latter stated that he had been arrested for carrying a firearm in his briefcase while in the courthouse. (T. 730, 831). Arzuaga stated that the charges had been dropped when he had completed a firearm education program. (T. 832). Arzuaga, however, was never challenged by the defense, and served as a juror in the instant case. (T. 1078).

[20] Defendant, in mistaken reliance upon transcript page 1474, instead of the correct citation at transcript page 1651, has stated that Strachan had been stricken prior to the defense

The trial judge agreed with the State and refused to allow the defense strike of Borges, ruling that it was racially motivated and pretextual:

> THE COURT: At this time I will find not only do the reasons appear to be racially motivated, they also appear to be pretextual.
>
> I looked at the other jurors that have been accepted by the defense. I see there are other jurors still remaining that have been accepted by the defense who have been accused of crimes and who are similarly situated as Mr. Borges. Since no questions were ever asked of him on this issue of whether he had any kind of special feelings towards the state it would appear the reason for striking him is clearly pretextual.

(T. 1647-8) The trial judge also noted that Borges' responses reflected he understood the issues, and was a pro-defense juror as he had clearly stated that he did not like "deals" and would have difficulty believing a cooperating witness. (T. 1648).[21]

The trial judge's ruling is in accordance with Melbourne v. State, 679 So. 2d 759, 764 (Fla. 1996)(n.7 omitted), which requires:

> If the explanation [for a peremptory challenge] is facially race-neutral and the court believes that, given all the circumstances surrounding the strike,[8] the explanation is not a pretext, the strike will be sustained. (step 3).

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challenge of Borges. (B. 59). The record, however, reflects that Strachan was in the pool and was challenged by the State after the defense challenge of Borges. (T. 1651).

[21] The record abundantly supports these statements attributed to Borges by the trial judge. (T. 1460, 1585).

> [8] Relevant circumstances may include -- but are not limited to the following: ... prior strikes exercised against the same racial group; a strike based on a reason equally applicable to an unchallenged juror; ... Slappy v. State, 522 So. 2d 18 (Fla.), cert. denied, 487 U.S. 1219, 108 S. Ct. 2873, 101 L. Ed. 2d 909 (1988).

In the instant case the defense's proffered reason, that Borges had entered a program sponsored by the State Attorney's Office and might thus feel obligated to the prosecution, was entirely without any record support, and the defense had not even asked any questions on the subject. Moreover, the defense had made prior challenges to Latin males but had not challenged other similarly situated members of the venire who had been previously arrested but not convicted. The trial judge's ruling was thus in accordance with Melbourne, supra. Prior arrests may be considered a race-neutral reason, although one usually asserted by the prosecution.[22] Even defense counsel noted below that it is normally "the State [that] doesn't want jurors that have had a negative experience with the police."[23] (T. 1351). The prior arrest, moreover, was not the reason proffered below by the defense. Rather Defendant below relied on speculations about Borges's gratitude to the prosecution about which defense counsel had not even bothered to inquire.

On appeal, Defendant also argues that the defense reasons were

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[22] See, e.g., Davis v. State, 691 So. 2d 1180 (Fla. 3d DCA 1997).

[23] Defense counsel made this observation during his objection to the State's challenge of another juror on the grounds that the juror had been previously arrested. Id.

not pretextual because the only other "truly 'similarly situated'" venireman was Arzuaga, who was "apparently Hispanic" by virtue of his "surname." (B. 58-60). Defendant has thus reasoned that since defense counsel accepted another similarly situated Hispanic male, the reasons for striking Borges could not have been racially motivated. No such argument was ever made in the court below. Indeed, juror "Alfred Arzuaga" was never identified as a "Hispanic" male, and the record is entirely silent as to his race or ethnic background. Cf. Franqui v. State, 699 So. 2d 1332, 1335 (Fla. 1997)(the record clearly reflected the race of the juror at issue, because it showed the juror, Aurelio Diaz, "was born and raised in Havana, Cuba," although he had not expressly been identified as an Hispanic male). The argument now pressed by Defendant is thus procedurally barred. Davis v. State, 691 So. 2d at 1181-82 (where the record does not identify the race of other similarly situated jurors, any claim of pretext that was not raised in the trial court is waived for purposes of appellate review); Austin v. State, 679 So. 2d 1197, 1199 (Fla. 3d DCA, 1996)("The proper time for exacting race-neutral reasons is during voir dire, and the proper forum is the trial court, not the appellate court").

In any event, even if preserved, the argument is without merit. As noted above, "Alfred Arzuaga" was never identified as Hispanic. Moreover, two other jurors, McGhee and Strachan, who were in the pool at the time of Borges' strike, both stated that they had been

previously arrested. Mr. Strachan specifically added that the charges against him, like those against Borges, had also been "dropped." In light of these similarly situated potential jurors who were not challenged by the defense, the trial court's ruling that the reasons given were pretextual is supported by the record and in accordance with this court's precedents. Melbourne; Slappy. This claim is thus unpreserved and without merit.

III.
THE PROSECUTION'S REASONS FOR ITS PEREMPTORY CHALLENGE WERE FACIALLY NEUTRAL AND SUPPORTED BY THE JUROR'S STATEMENTS AND THE OBSERVATIONS OF BOTH THE TRIAL COURT AND DEFENSE COUNSEL BELOW.

Defendant contends that the State's peremptory challenge of juror Duval was unsupported by the record and pretextual. The prosecution's reliance upon Duval's inconsistent responses, which reflected confusion or lack of understanding of questions was, however, supported by the record. The trial judge's ruling that the prosecutor's reasons were genuine is thus not shown to be reversible error pursuant to Melbourne v. State, 679 So. 2d 759 (Fla. 1996).

The prosecutor first challenged Duval for cause, because in response to defense questioning she had stated she would not be able to consider a verdict of guilt based upon the testimony of a codefendant who had plea-bargained with the State. (T. 1653). That challenge was supported by the record. Defense counsel asked each juror how he or she would feel about testimony by a witness who had

been involved in the crime and purportedly received lenient treatment by the State in exchange for testimony against Defendant. (T. 1522-1618). Duval's responses were at best equivocal:

> [DEFENSE COUNSEL]: ... You heard what is the primary question I have been asking everybody. Miss Duval, being the person of goodness that you are how do you feel about what we have been talking about?
>
> VENIREPERSON DUVAL: For me the guy [defendant] is innocent because -- we can't say he is guilty or not guilty.
>
> [DEFENSE COUNSEL]: ... Suppose someone comes forward and has all the things we have been talking about that we shared that he has.
>
> For example, he is a killer, he has committed the homicides, he has told different stories, he has a reason for lying against my client.
>
> Can you keep an open mind to that or is the fact he's there pointing out my client enough for you to say he is guilty, I'd not want to hear anything else?
>
> VENIREPERSON DUVAL: I would have to hear about it. I can't say he is guilty.

(T. 1617-18).

The prosecutor had thus accurately characterized Duval as saying that she would find Defendant not guilty regardless of the testimony, where the source of the evidence was his codefendant. Defense counsel nevertheless objected, to the State's cause challenge, claiming that Duval had said "almost the exact opposite." (T. 1653). The trial judge noted that she had had trouble hearing everything said by Duval, and thus called her for further questioning:

> THE COURT: ... When the lawyers were asking you about the witness who might be called to testify in this case do you remember the questions about a witness testifying?
>
> VENIREPERSON DUVAL: Witness testifying in this case?
>
> THE COURT: Yes, about a witness who might be called to testify who had something to do with a homicide. Do you recall those questions?
>
> VENIREPERSON DUVAL: Yes, I remember.
>
> THE COURT: If such a witness were called to testify in this case, how do you feel about such a witness?
>
> VENIREPERSON DUVAL: I don't feel bad about it.
>
> * * *
>
> THE COURT: Would you automatically discount it or not believe him because he has admitted to being a part of the homicide? Do you understand the question?
>
> VENIREPERSON DUVAL: Yes I understand.
>
> THE COURT: Would you automatically not believe him because he has admitted to being a part of the homicide or would you listen to his testimony?
>
> VENIREPERSON DUVAL: I have to believe because I don't know anything yet. I have to believe now about everything they say to me.

(T. 1654). Upon further questioning by the prosecutor, Duval then denied having ever said that she would have any trouble with testimony from a codefendant. (T. 1655-56).

The trial judge denied the challenge for cause, whereupon the prosecutor sought to exercise a peremptory strike of Duval. (T. 1656). The prosecutor then additionally stated that this juror was having difficulty in either understanding or hearing questions, and "has some confusion about everything going on." (T. 1656-57). The prosecutor noted that even defense counsel during voir dire had

specifically asked Duval whether she was having trouble understanding the questions asked. Id. Defense counsel had indeed twice asked Ms. Duval whether she "understood" everything that was being said. (T. 1619, 1627-28). Counsel's concerns were well justified at that juncture. Despite the serious nature of the questions being asked, defense counsel had noted that Duval was "smiling through" the discussions at voir dire. (T. 1617). Duval had also given inconsistent answers to even routine questions. For example, she had first stated that she had previously "serve[d]" on a jury, but further questioning demonstrated that she had not. (T. 1311). She had stated that she was divorced, and although her ex-husband kept returning, she stated that "the last time he try to come back I don't take him back." (T. 1426). Upon subsequent questioning, however, she stated that her ex-husband was still living with her. (T. 1617). Moreover, as noted, Duval had first expressed difficulty believing a codefendant's testimony, but then denied having expressed any trouble with such evidence.

In light of this record, the trial judge sustained the State's peremptory challenge, ruling that the reason given was race-neutral and in no way pretextual:

> THE COURT: I note first of all defense seemed to have great concern about [Duval's] ability to understand the questions and in fact when defense got up they specifically asked her whether or not she's understanding everything.
>
> I didn't want to embarrass her by saying I didn't understand her responses. ... I had difficulty

> understanding what she was saying ... It did seem when I questioned her that she was not following my questions or understanding them fully.
>
> I was speaking slowly and very directly to her. I am going to find at this time it is not only race neutral but does not appear to be in any way pretextual.

(T. 1658-59).

The trial judge's ruling is in accordance with Melbourne, 679 So. 2d at 764-65 (footnotes omitted):

> If the explanation is facially race-neutral and the court believes that, given all the circumstances surrounding the strike, the explanation is not a pretext, the strike will be sustained (step 3). The court's focus in step 3 is not the reasonableness of the explanation but rather its genuineness. Throughout this process, the burden of persuasion never leaves the opponent of the strike to prove purposeful discrimination.
>
> Voir dire proceedings are extraordinarily rich in diversity and no rigid set of rules will work in every case. Accordingly, reviewing courts should keep in mind two principles when enforcing the above guidelines. First, peremptories are presumed to be exercised in a non-discriminatory manner. Second, the trial court's decision turns primarily on an assessment of credibility and will be affirmed on appeal unless clearly erroneous.

A juror's inconsistent and confusing answers, which reflect either a lack of understanding or confusion, constitute a race-neutral reason for a peremptory challenge. Valle v. State, 581 So. 2d 40 n.3, 44 n.4 (Fla. 1991)(reason that juror "did not appear to have the sense or intellectual capacity to understand the case" was deemed to be racially neutral); McNair v. State, 579 So. 2d 264, 266 (Fla. 2d DCA 1991)(prospective juror's confusion and difficulty in understanding the case are valid race-neutral reasons for

exercising a peremptory challenge);[24] Purkett v. Elem, 514 U.S. 765, 768 (1995) (unless a discriminatory intent is inherent in the explanation, the reason offered will be deemed race-neutral).[25] The reasons given by the State below were not only supported by the record, but were also confirmed by both the trial judge and even defense counsel's own record observations. No error has been demonstrated.

IV.

THE TRIAL COURT PROPERLY ADMITTED EVIDENCE THAT REBUTTED THE DEFENSE'S INSINUATION DURING THE CROSS-EXAMINATION OF TWO WITNESSES THAT DEFENDANT WAS NON-VIOLENT AND THAT THE CODEFENDANT HAD MANUFACTURED HIS TESTIMONY AGAINST DEFENDANT AND DEFENDANT MAY NOT NOW COMPLAIN THAT SUPPOSED OTHER CRIMES EVIDENCE WAS ADMITTED AGAINST HIM WHERE HE DECLINED ALL OFFERS TO CURE THE INADVERTENT COMMENT BELOW.

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[24] That court explained:

> There are valid reasons for striking a prospective juror which can be very obvious in a courtroom and yet somewhat camouflaged within the appellate record. Demeanor, attitude, and juror confusion are sometimes apparent to the live participants while the record permits an appellate panel only a limited, vicarious view of the problem...On this record, which does provide some support for the trial court's ruling, we believe that we should defer to the decision of the experienced trial judge who was present during the critical process of questioning the prospective jurors.

[25] Defendant's reliance on Spencer v. State, 615 So. 2d 688, 689-90 (Fla. 1993), is unwarranted. In that case, the trial judge sua sponte excused jurors based upon their purported "IQ," without articulating any criteria or standards despite repeated requests by defense counsel. Likewise, Bullock v. State, 670 So.2d 1171 (Fla. 3d DCA 1996), Givens v. State, 619 So. 2d 500 (Fla. 1st DCA 1993), and Brown v. State, 597 So.2d 369 (Fla. 3d DCA 1992), all involved a lack of record support for the reasons given, and are thus also factually dissimilar.

Defendant next claims that the State improperly introduced collateral crimes evidence. To the extent that these claims are preserved, they are without merit. Moreover, any purported error would be harmless beyond a reasonable doubt.

1. Evidence of Defendant's Prior Violent Acts Although Defendant's description of the bench conference on the admissibility of the evidence of Defendant's prior violent acts is largely accurate, he omits the alternative basis upon which the court based its ruling. In addition to finding that the defense had opened the door to an explanation of why Luis disliked Defendant, the court also determined that the evidence was relevant to show why Luis feared the Defendant.[26] (T. 2962, 2970-71, 2974). He further fails to note that Defendant conceded several times that he had opened the door to this rebuttal evidence, his only argument below going to prejudice. (T. 2950, 2973). Because he conceded below that he had opened the door to the rebuttal testimony, Defendant may not now claim to the contrary. The only question thus properly before this court is that raised below -- whether the

[26] Luis testified that he shot Genevieve because Defendant ordered him to do so, and Luis was afraid Defendant would shoot him if he did not. He further stated he did not go to the police because he was afraid of Defendant. On cross, the defense extensively questioned Luis's claim that he did not intend to hurt anyone when he agreed to the crime, and that Defendant led him into it, why he helped dispose of the guns, and how he never went to the police on his own. (T. 2928, 2932-2935). Defendant conceded below that there was no "Williams Rule" notice problem because the evidence was coming out in rebuttal. (T. 2967).

evidence's probative value was outweighed by any undue prejudice.

The defense's entire theory of the case was that Luis was lying out of animosity to Defendant. The defense first began to attack Luis's veracity on this account in its in opening statement:

> Manny [Defendant] is not guilty of this. And it just as wrong that he is sitting here and sitting here for one reason. Because of Luis Rodriguez. Luis Rodriguez who has lied.
>
> * * *
>
> Manny was what they called the black sheep of the family. He was the outcast. Maria's family, Luis Rodriguez [sic] family, all that group of people never liked Manny. Why are you with him, Maria? He is not good enough for you. Oh, my God, you are going to have a kid with him? My God, what are you doing? He has always been an outcast.
>
> Now Luis Rodriguez killed three people back in 1984. He finally, after denying it and making up different stories, saying al sort of different things, would come in and tell you that he killed these people. But he would also tell you--you have to listen to Luis because this case, the State of Florida's case rises or falls completely, totally on Luis. If you believe beyond a reasonable doubt what Luis tells you from the witness stand, you have to convict Manny, you have to. But, I suggest to you no reasonable person would take what he says and believe it beyond a reasonable doubt. In fact, you wouldn't believe it.
>
> * * *
>
> The gun went off, not that [Luis] killed the lady and or ladies and gentleman. No, the gun just went off. He would say Manny got angry. You heard the prosecutor say that. Manny didn't get angry. Manny wasn't there. Luis is one who got angry.
>
> Luis is trapped. ... I guess he would get a little vendetta. He would get even with the black sheep of the family, with the outcast of the family.
>
> Luis Rodriguez, when first confronted by the police said, I don/t know what you are talking about. What murder

in Miami? When he is told Tony[27] has ratted on you, which was a lie, then he goes, oh, really. So Tony said that. Then he starts forth with his own little statement which we know does not fit in to the physical facts.

Now we can go on and on and on and over this for hours. You are going to see somebody who probably never in your life you have ever seen. When I said to you before about dealing with devil and I suggest to you his answers would really prove that. The devil, some evil force would come in here and lie purposely. And you would stare at him, this is what happened. So please be on your guard.

(T. 1741-42, 1743, 1749-50). This theme was returned to during the defense's cross-examination of Cookie, Luis's sister, and Defendant's "wife" at the time of the murders, and testimony was further elicited as to Defendant's allegedly warm and caring nature:

Q. Did your family ever like Tony?

A. Never had, unless he gave them money. He was Mr. Nice Guy when he gave them money. When he didn't have money to give, he was no good, just like they did to me.
Q. I had told the jury in opening statement that your -- [State objection]. Was Tony an outcast as far as your family was concerned?

A. An outcast? What is that?

Q. Somebody not liked, not part of the group, not part of the family, that type of thing.

A. Tony I think somehow had a hard childhood, but he is a very warm person inside. ...

Q. Isn't it true that the people in Orlando Florida --

A. Um-umm.

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[27] Defendant was known as "Tony" to most of the witnesses in the case. Throughout trial counsel referred to him as either "Manny" or "Tony."

Q. -- family, brothers, sisters and so forth --

A. They are all my step family.

Q. I understand. They never liked Tony they didn't want him around?

A. Um-umm. Truth from day one.

Q. And they made it clear to him and to you?

(T. 2726-28). At that point, the State objected that the defense had elicited testimony that Luis's family irrationally hated Defendant and that Defendant was a "warm" person, and that the State should be permitted to rebut these claims. (T. 2728-29). The court concluded that the "door [was] opened a tiny bit," but declined to allow the State to go into it at that time. (T. 2730). Despite the court's notice that it was going into dangerous territory, the defense continued on this path in its cross examination of the very next witness, Luis. Defense counsel asserted that Luis did not "like" Defendant, in two separate questions, then escalated the degree of dislike in the succeeding questions to "hating somebody's guts," and "tremendous dislike." (T. 2896-97). Counsel twice insinuated that Luis implicated Defendant only because he was told that Defendant "was dumping on" him, i.e. blaming the crime on him. (T. 2861, 2901).

In view of the foregoing, the trial court properly allowed the State to elicit a limited amount[28] of this evidence in rebuttal. The

[28] Luis was examined outside the jury's presence about why he disliked and feared Defendant. The trial court ruled that a

objective of redirect examination is to explain or correct testimony produced on cross. Jones v. State, 440 So. 2d 570, 576 (Fla. 1983). The State is thus permitted on redirect, where the defense has left an "impression lingering," to elicit evidence that clarifies that impression. Id., 440 So. 2d at 575. That the evidence may point to other criminal activities does not render it inadmissible where it is not introduced solely to show propensity. Id. Here, the defense had elicited testimony from both Luis and Cookie, that their family was out to get Defendant, and suggested that Luis's claim that he feared Defendant was false. As such the trial court properly allowed the State to correct these false impressions. See also, Tompkins v. State, 502 So. 2d 415 (Fla. 1986)(where victim's mother on cross stated her daughter had never complained of the defendant making sexual advances, prosecution was entitled to explore on redirect any other complaints the victim may have had about the defendant); Lambrix v. State, 494 So. 2d 1143, 1147 (Fla. 1986)(impeachment of witness opens door to explanation of surrounding circumstances on redirect); Huff v. State, 495 So. 2d 145, 150 (Fla. 1986)(where entire "thrust" of defense was that State's evidence was created solely to justify the arrest of the defendant, defense "open[ed] the door" to detective's opinion on

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number of the factors to which Luis cited would not be admitted, such as Defendant's failure to support his children, his numerous periods of incarceration, and convictions, because it felt such matters would be unduly prejudicial. (T. 2974-75).

redirect that defendant was guilty).

2. Reference to a Police ID Number As was the case with the alleged comment on silence discussed at Point I-1, supra, Defendant did not contemporaneously object to this testimony. Rather, he waited a significant period of time to raise the issue,[29] and then rejected a curative on the grounds that it would only call attention to the issue. As such this claim was not raised at a time when the trial court could have cured any error,[30] and is not preserved for appellate review.

Even were this issue properly preserved, it would be without merit. Unlike in the cases cited by Defendant, the witness made no suggestion that Defendant had any criminal history, and the brief reference to a "police ID number," which was not elaborated upon nor mentioned again, was not in any way elicited by the prosecutor's question, which simply asked whether the name given the police by Defendant was false. (T. 2179). Cf. Roman v. State, 475 So. 2d 1228, 1234 (Fla. 1985)(prosecutor asked witness whether he had reviewed the Sheriff's Office records concerning the defendant); Rimes v. State, 645 So. 2d 1080, 1080 (Fla. 2d DCA 1994)(in drug sale case, witness testified that he got defendant's

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[29] The objection was interposed, as discussed above, at the end of direct examination, after a 15 minute recess. (T. 2199). Further, as to this comment, 20 transcript pages had also elapsed.

[30] Although the motion for mistrial was denied, the court did offer to give a curative instruction that was declined. (T. 2202).

picture from another jurisdiction's "vice and narcotics file"); Perkins v. State, 349 So. 2d 776, 777 (Fla. 2d DCA 1977)(in robbery trial, victim testified that friend said it was not the first time the defendant had robbed someone, a detective testified that another jurisdiction had a mug-shot of the defendant, and a second detective testified that he was familiar with defendant's modus operandi and description); Whitehead v. State, 279 So. 2d 99, 100 (Fla. 2d DCA 1973)(prosecutor elicited evidence of numerous prior unrelated and dissimilar crimes, along with the defendant's mug shot in each case). Even if the answer were improper, it would be harmless beyond a reasonable doubt, as discussed, infra.

3. Misstatement as to the Number of Aliases Defendant claims that the alleged error relating to the mention of the police ID number was "buttressed" by Detective Crawford's inadvertent misstatement that Defendant had ten aliases. The defense's actions below when the detective misspoke suggest an attempt to sow error. At the time the comment was made, it was clear that the detective had misspoken, yet the defense nevertheless declined all efforts to clarify the testimony:[31]

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[31] Notably Defendant does not now claim that the evidence, which was already admitted at the time Crawford misspoke, that Defendant had twice given false names to the police should not have been admitted; indeed, he concedes that this evidence minimizes the prejudice of the the detective's testimony. (B. 73 n.29). Nor would he have a basis for doing so. Defendant gave the detectives a false name on two separate occasions when Defendant contacted them for the purpose of giving them purported leads in this case. Both leads turned out to be false. Plainly Defendant's attempts to mislead the

[DEFENSE]: Move for mistrial based upon the representation where there is an indication that there were ten names used by the Defendant. We know there were two. But the remaining names can only draw an indication which refer [sic] to other arrests, other bad conduct or misconduct, other police cases which reflects on the presumption of innocence.

[STATE]: The answer I expected to illicit [sic] was in fact the number two. I am not certain where the number ten came from. But I am willing to suggest to the Court that it is nothing more than an error on the witness' part. But I would like to go back and clarify, if not prejudice, if we can resolve. As a result of going back through the file, in fact there is only two previous names used.

THE COURT: ... You are going to attempt to rehabilitate. Obviously it is not the answer you expected. Asking these open ended questions you don't always end up with what you expected.

[DEFENSE]: My request is for a mistrial. The reason I would object to any rehabilitation, because it is clearly highlighted, now it is highlighted who wants to hear ten and why ten. There is no written habitualization and I frankly think that would be extremely prejudicial, so my request is for a mistrial. There is no more presumption of innocence. That is severely be [sic] damaged by that comment. And comment on -- whatever constitutional right may reside at this point.

And frankly, I expected the same response. You stated which was the two which was previously testified to. What he has now done is created other possible alias cases, criminal activities, and I don't see any way we can erase it from the jury's mind.

I respect counsel for the State for trying to clarify the situation, it would simply highlight. There is no way to clear up the situation. It should never have been asked. We didn't invite it, It [sic] was asked and it was answered and we did nothing to contribute to it. It is an insurmountable situation in this case.

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police in their investigation of the murders of which he stood charged was relevant. The giving of the false names was an integral part of that conduct.

> THE COURT: I don't think its [sic] insurmountable. The question in such a way as phrased, as how many names he used in this investigation, not how many he used.[32] I don't think it is insurmountable.
>
> My concern is, do you feel assured you [sic] going to be able to get the response you expect by trying to rehabilitate this witness.

(T. 2226-28). After further discussion, the jury was excused so the witness could be cautioned outside its presence. (T. 2228-29). The prosecutor explained to him why the sidebar had occurred and again asked the witness how many names Defendant had used:

> [Q.] Other that [sic] the name Manolo Rodriguez, how many different names had he previously used?
>
> A. Two.
>
> * * *
>
> Q. And did you misunderstand my question before about how many names?
>
> A. Yes, sir, I did. ...
>
> [STATE]: I would proffer that would be the testimony I sought to illicit [sic] and that I be permitted to go on illicit [sic] in a fashion similar to that.
>
> THE COURT: Let me caution, you must not at any time during cross or direct in anyway [sic] refer to the fact that the defendant may have used any other names besides the two names ...
>
> THE WITNESS: Yes, sir, [sic] I am sorry.
>
> THE COURT: Are you requesting any curative instruction. First of all are you requesting a curative?
>
> [DEFENSE]: Normally I would. I thank the court for

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[32] The trial court correctly observed that the State specifically asked how many names Defendant had used "in this investigation." (T. 2226).

> the offer. I think in this situation that highlight is something that would not serve any purpose in light of my previous request for a mistrial.
>
> THE COURT: The motion for mistrial is going to be denied, based upon the fact the way the question was phrased, was any other name the defendant gave to the police re this investigation. His response was ten. Which appears to be only an inaccurate response, which I believe can be clarified by the State by further questioning.
>
> [DEFENSE]: I frankly don't like any more questioning about that. We are down to two names and we have testimony on -- I object to further testimony as to the accommodations of ten and two. We should simply move on. The Court has instructed witness. The witness obviously understands the Court [sic] instruction. I think we can go from there. [The prosecutor]'s question to the detective has been clear situation as I have heard.
>
> THE COURT: So specifically that the State not clarify that answer to the jury.
>
> [DEFENSE]: I think that the testimony has been brought that there are two separate names. ... I am requesting that it not be highlighted. ...
>
> THE COURT: It can be asked in a question that doesn't mention the number ten. But this clarifies his response without the mentioning of the number ten. Is that any less offensive?
>
> [STATE]: If counsel don't [sic] want me to go into it, he believes it is a better remedy, I would be more than happy not to go into the area.

(T. 2229-32). Thereupon the jury returned and the examination went on to other areas. As the trial judge herself noted, there is absolutely no reason why the witness could not simply have explained, in a single question and answer, that he had misspoke, and that Defendant had used only two names. It cannot reasonably be argued that such procedure would have unduly "highlighted" the

response. Defendant instead refused to allow this simple cure, and now accuses the State of improperly introducing improper evidence of prior criminal activity. Such deliberate sowing of error should not be countenanced.

4. Harmless Error Finally, even if any of Defendant's collateral crimes claims had merit, any error, individually or collectively, would be harmless beyond a reasonable doubt. The ID and alias testimony consisted of one answer each in the course of lengthy witness presentations. The prior acts of violence, although somewhat longer, were still relatively brief, were not made a feature of the case, and were elicited from a witness who testified for nearly an entire day in the course of this two-week trial. Furthermore, there was ample evidence, to which Defendant does not now object, of Defendant repeated lying to the police in an effort to deflect blame from himself. Defendant nevertheless himself ultimately admitted to participation in the crime as a principal. As such, and in view of the other evidence discussed with reference to Point I, there is no reasonable possibility that these three brief incidents could have contributed to the jury's verdict.

V.

THE TRIAL COURT PROPERLY PERMITTED THE STATE TO ELICIT HEARSAY TESTIMONY DURING THE PENALTY PHASE WHERE THE DEFENSE HAD DEPOSED THE DECLARANT, THE DECLARANT WAS AVAILABLE TO TESTIFY IF THE DEFENSE WISHED TO CALL HIM, AND THE DEFENSE WAS GIVEN SEVERAL OPPORTUNITIES TO CROSS-EXAMINE THE WITNESS, AND CALL ANY SURREBUTTAL WITNESSES IT

DESIRED.

Defendant asserts that the trial court erred in allowing a police witness to testify during the penalty phase about statements of Defendant that were related to him by Defendant's cellmate. Defendant asserts that this statement was inadmissible "double hearsay." However, hearsay is admissible in the penalty phase of a capital trial where the defendant's confrontation rights are preserved. Here, Defendant had ample opportunity to confront the inmate's statement, but simply chose not to do so. As such, this claim is not preserved, and in any event, no error occurred. Finally, any error would be harmless beyond a reasonable doubt.

As Defendant himself concedes, otherwise inadmissible[33] hearsay is permitted in the penalty phase, where the Defendant "is accorded a fair opportunity to rebut" it. §921.141(2), Fla. Stat.; B. 75. Here, the defense objected when the State sought to elicit Lago's statements through Detective Crawford. (T. 4065). After a lengthy discussion, the trial court overruled the objection because the defense had long been aware that the detective had Lago's statements. (T. 4075). Although the defense claimed at that time, and asserts now, that it was unable to confront the statements, the

[33] Defendant repeatedly refers to "double hearsay" in his brief. However, the Defendant's statements contained within Lago's would have been admissible even under the more-stringent guilt-phase evidentiary rules as an admission of a party opponent. §90.802(18), Fla. Stat. As such, there is no hearsay-within-hearsay issue; the only issue is as to Lago's statement per se.

record simply does not support that assertion.

Detective Crawford spoke with Lago in September 1993, shortly after Defendant's arrest and return to Miami, and more than three years before he testified. Thereafter, the defense deposed Mr. Lago for approximately two hours. (S.R. 1, 110). At the deposition, Lago made numerous sarcastic statements that defense counsel later characterized as "absurd."[34] After the deposition, the State informed counsel that Lago would not be called as a witness.[35]

In the deposition, Lago admitted to numerous auto theft convictions in New Jersey, to being an active informant working for both state and federal authorities, using drugs, smuggling drugs and alcohol into jail, and bribing jail guards. He also admitted that he had a conviction for attempted first-degree murder, a charge that was pending at the time he gave the statements about Defendant to the police. Defense counsel acknowledged they were aware of this information at trial. (T. 4069). This deposition was, of course, available to impeach Crawford's testimony. §90.806(1), Fla. Stat. (hearsay statement may be impeached by any means

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[34] Even that characterization does not seem apt. Although the witness was difficult and obnoxious, the deposition does not reflect any loss of contact with reality on Lago's part. (S.R. 4-109). The "absurdity" claim apparently was based on Lago's statements that he had a DC-10 pilot's license and got information from Santa Claus. On cross, he conceded that he was being sarcastic when he made these claims, because defense counsel was irritating him.

[35] The State never represented that it would not use the information, only that it would not call Lago.

available had the declarant testified). Lago was brought to Dade County and was available if the defense chose to call him. (T. 4070). Had they chosen to call Lago, they could have treated him as a state witness and conducted cross-examination. §90.806(2), Fla. Stat. Both counsel and Defendant professed awareness of several witness, two of whom they referred to by name, who allegedly could have contradicted the statements made by Lago. (T. 4085-86, 4089). Yet, the defense repeatedly declined the opportunity to call Lago or other witnesses in surrebuttal. (T. 4090, 4145, 4148). Not only did the defense choose not to call any witnesses, it also declined to cross-examine Detective Crawford at all. (T. 4083). Under the circumstances, it would appear that the defense was more interested in creating an appellate issue than in rebutting Lago's testimony. As such he has not preserved this claim for review. See, King v. State, 514 So. 2d 354 (Fla. 1987)(failure to attempt to rebut hearsay evidence in penalty phase, where defense had opportunity, waived issue).

Moreover, given the information that the defense possessed, it clear that "he was given a fair opportunity to rebut" Lago's statements. That he chose, apparently for tactical reasons, not to do so does not render the admission of this evidence error.[36] Damren

[36] Defendant makes much of the prosecutor's representation that he was not calling Lago. Both Mr. Zenobi and Mr. Houlihan are experienced capital trial lawyers. They had long been aware of that Crawford had the information to which he testified. As the trial court found, defense counsel "always knew potentially in the

v. State, 696 So. 2d 709, 713 (Fla. 1997)(trial court properly allowed three witnesses to testify what the defendant's then-deceased accomplice said about the murder, because the defense had the opportunity to rebut by cross-examining the witnesses through whom the hearsay was offered); Lawrence v. State, 691 So. 2d 1068, 1073 (Fla. 1997)(no error in admitting hearsay testimony where defense could have admitted prior cross-examination of declarant, but did not and where defense failed to proffer any other rebuttal); Spencer v. State, 645 So. 2d 377, 383 (Fla. 1994)(testimony by police officer regarding statements made by deceased murder victim was not error in penalty phase, opportunity to cross-examine police officer satisfied §921.141(2), Fla. Stat.); Clark v. State, 613 So. 2d 412, 415 (Fla. 1992)(no error in police witness testifying about hearsay with regard to prior violent felony: "Clark had the opportunity to rebut any hearsay ... [t]hat he did not or could not rebut this testimony does not make it inadmissible").[37]

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penalty phase that the detective could be called and could testify to the statements of Lago without Lago having been called." (T. 4075). As such, particularly in light of the matters that were available to them as impeachment, this contention is simply without merit.

[37] Most of the cases cited by Defendant are factually inapposite. See, Engle v. State, 438 So. 2d 803, 814 (Fla. 1983)(defendant could not confront hearsay statements of codefendant where declarant was unavailable because had invoked his Fifth Amendment right to not testify); Gardner v. State, 480 So. 2d 91, 94 (Fla. 1985)(same); Gilliam v. State, 582 So. 2d 610, 612 (Fla. 1991), states simply that hearsay was admitted without the

Even assuming, arguendo, that error occurred, it would be harmless beyond a reasonable doubt.[38] Although, as Defendant notes, Lago's testimony was mentioned in closing, the short passage quoted in Defendant's brief was the sole mention of it in the course of a closing argument that consumes seventy-three transcript pages, (T. 4195-4271), with fifty of those pages devoted to discussing why Defendant's mitigation evidence lacked substance. (T. 4200-4250). Of greater import, the evidence apart from Lago's statement convincingly demonstrated that Defendant's primary theory in mitigation -- that he was schizophrenic -- was without any factual foundation. See, 26-45, supra.

VI.

DEFENDANT WAS NOT DENIED THE OPPORTUNITY TO PRESENT MITIGATION EVIDENCE WHERE, ALTHOUGH AN OBJECTION TO TESTIMONY AS TO WHETHER DEFENDANT KNEW RIGHT FROM WRONG WAS SUSTAINED, THE SAME WITNESS SUBSEQUENTLY GAVE THAT

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opportunity for rebuttal, and was thus error. That principle is enunciated in the statute itself, and is not in dispute. The issue here is whether the facts in Defendant's case reflect that he was afforded the opportunity for rebuttal. As Gilliam offers no facts, it obviously casts no light on this issue. Likewise, Rhodes v. State, 638 So. 2d 920, 924 (Fla. 1994), simply states that the defendant was unable to rebut a 20-year old doctor's report from Oregon, without discussing the merits of the claim that it was unrebuttable.

[38] To the extent Defendant is claiming error based on the alleged admission of evidence of uncharged crimes, based on one sentence to which an objection was sustained, (B. 77 n.30), any such claim also would be harmless beyond a reasonable doubt, in light of the evidence of seventy-one convictions for prior violent felonies that were admitted against Defendant at the penalty phase. (R. 1740). Rhodes, 638 So. 2d at 927 (limited reference to uncharged crime harmless where there was other evidence of the defendant's prior criminal acts).

EXACT TESTIMONY WITHOUT OBJECTION.

Defendant's next claim is that the trial court erred in sustaining a State objection when the defense sought to elicit testimony from Dr. Pass as to whether Defendant knew right from wrong, requiring a new sentencing hearing. This issue is wholly specious.

Regardless of the propriety of the trial court's ruling, any error would clearly be harmless beyond a reasonable doubt where, almost immediately after the objection was sustained, Dr. Pass went ahead and gave the response anyway:

> I did not think that [Defendant] knew right from wrong or the nature of the consequences of his acts [in 1977].

(T. 3643). No objection was lodged by the State at that time. This claim should be rejected.

VII.
THE TRIAL COURT DID NOT IMPROPERLY FAIL TO MERGE THE BURGLARY AND PECUNIARY GAIN/ROBBERY FACTORS.

Defendant's seventh claim is that the trial court erroneously failed to merge the felony murder aggravator, based upon commission during a burglary, and the pecuniary gain aggravator. This claim is without merit, and any error would be harmless beyond a reasonable doubt.

As this court explained in Toole v. State, 479 So. 2d 731, 731 (Fla. 1985), improper doubling only occurs where one aggravator necessarily encompasses the conduct subsumed in the other. See also, Trepal v. State, 621 So. 2d 1361 (Fla. 1993)(same). Here, as

the State argued to the trial court below, the jury convicted Defendant of burglary with an assault. In determining that the burglary factor should not be merged with the robbery/pecuniary gain factor, the trial court specifically noted that it was considering the different aspects of the crime, and different facts in support of each factor. (R. 1751-52).[39] No error occurred. Brown v. State, 473 So. 2d 1260, 1267 (Fla. 1985); Bates v. State, 465 So. 2d 490, 492 (Fla. 1985).

Even if these factors should have been merged, any error would be harmless beyond a reasonable doubt. If the burglary aggravator were merged with the pecuniary gain/robbery aggravator, five aggravators would remain. In addition to the pecuniary gain/robbery/burglary factor, the trial court also properly found[40] CCP, avoid arrest, and under sentence of imprisonment, to all of which the court accorded great weight. (R. 1739-40, 1750- 60). The court also applied the prior violent felony aggravator based on

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[39] The State is not unmindful of the Court's previous holdings on this subject, such as those cited by the defense. However, the State would submit that the nature of the victim's rights invaded by the commission of a burglary warrants separate consideration of the burglary as an aggravator apart from the pecuniary gain aggravator. The home has long been accorded special sanctity in Anglo-American jurisprudence. Indeed, the judge, in her sentencing order cited just such considerations in concluding that the factor would not be merged with the pecuniary gain factor: "The Josephs certainly had the right to feel safe in their own home." (R. 1754).

[40] As discussed at Points VIII and IX, infra, Defendant's claims as to the CCP and avoid arrest aggravators are meritless.

"the staggering number of seventy-one" priors and the two contemporaneous murders, to which the court gave "very great weight." (R. 1740-1750)(emphasis supplied). As discussed above, at Point V, Defendant's main argument in mitigation was not factually supported. The trial court thus rejected Defendant's claimed statutory mitigation.[41] (R. 1760-1782). It rejected, as not established, most of the non-statutory mitigation that Defendant proffered. (R. 1784-85, 1786). It gave "some weight" to Defendant's mental "problems," although it noted that it had "chosen to give the Defendant the benefit of the doubt," considering that every expert who testified found "Defendant to be exaggerating his symptoms, faking his amnesia, and for the most part malingering." (R. 1784). It accorded "minimal weight" to his alleged good personality qualities. (R. 1788). The court gave substantial weight only to Defendant's alleged drug problem. (R. 1786). The jury[42] returned three recommendations of death by a 12-0 vote, after an hour and twenty minutes of deliberation, to which the trial court gave "great consideration," noting that the jury had spoken "with unmistakable clarity and with a unanimous voice." (T. 4317, 4322-23, R. 1799). The court determined that aggravation "clearly and

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[41] On appeal, Defendant has not questioned any of the trial court's findings as to mitigation.

[42] Defendant does not allege any jury error with regard to this aggravator, and indeed, it was given a merger instruction regarding these aggravators. (T. 4309).

remarkably outweigh[ed]" the mitigation, a conclusion it would reach even if it declined to consider the CCP or avoid arrest aggravators. (R. 1789).

Further, the trial court did not merely tabulate the number of aggravators:

> In weighing the aggravating circumstances against the mitigating circumstances the Court is cognizant that the process is not simply an arithmetical one. It is not a weighing of numbers. It is a qualitative as opposed to a quantitative process. The Court must and does look to the nature and quality of the aggravators and the mitigators which it has found to exist.

(R. 1789). The court then concluded that based on the comparative quality of the evidence underlying the aggravation and mitigation, death was appropriate:

> The Defendant's offered mitigating circumstances pale when considered and weighed against the fact that the Defendant committed two contemporaneous murders to each individual murder, that he has previously been convicted of some seventy (70) or more violent felony offenses, that these murders were committed in two of the victims [sic] own home and in the home where the third victim had visited countless times, and that these homicides were all committed while the Defendant was on parole for an armed robbery. Bea Sabe joseph, [sic] Sam joseph [sic] and Genevieve Abraham were three elderly people. The Defendant wrote this court that the Josephs were wonderful people who were kind to everyone including him. Mrs. Abraham was a stranger to the Defendant, and yet all three were coldly and deliberately murdered by the Defendant and/or at the Defendant's insistence.

(R. 1790). In its discussion of the individual factors, the court also relied on the evidence it found in support of the factor in evaluating the weight to be accorded each factor. The weight given to the burglary factor was premised largely on the fact that the

sanctity of the Josephs' home had been violated:

> The Josephs certainly had the right to feel safe and be safe in their own home. Mrs. Abraham, who had visited the Josephs on numerous occasions, also had the right to feel safe in the Joseph's [sic] home. Based upon the evidence which supports this aggravator, this Court gives this aggravating circumstance great weight.

(R. 1751). When considering the weight to be given to the pecuniary gain aggravator, the court specifically disavowed any reliance on the evidence it had previously discussed with regard to the burglary aggravator. (R. 1758). The weight given to the robbery/pecuniary gain aggravator, rather, was based on its important role as the cause of the entire criminal episode:

> As pecuniary gain was the motivating factor which set the entire chain of events into motion, the Court assigns great weight to this aggravating circumstance.

(R. 1758).

Obviously, the underlying facts of each aggravating circumstance properly affect the weight that a trial court will give the factor. Here, the the trial court based the weight given to each of the aggravators that it found on wholly different considerations. Thus, accepting Defendant's premise that the burglary aggravator should have been merged with the robbery/pecuniary gain factor, it cannot be gainsaid that the court would have properly considered both the fact that Defendant's greed motivate the entire crime, and the fact that he violated the sanctity of the Josephs' home in determining the weight to be accorded the merged factor. As such, particularly when viewed in

light of the mitigation and aggravation discussed above, there is no reasonable possibility that the sentence would have been different had the trial court merged these factors.

VIII.
THE TRIAL COURT PROPERLY DETERMINED THAT THESE MURDERS WERE COLD, CALCULATED AND PREMEDITATED.

Defendant next alleges that the trial court erred in finding that these murders were cold, calculated and premeditated. The trial court's conclusion that CCP applied was amply supported by the record, and should be affirmed.

In her sentencing order, the trial judge detailed the evidence in support of this factor. (R. 1758-61). Defendant pooh-poohs the trial court's conclusion that a "back-up plan" existed to execute the Josephs should his hostage ruse fail. Defendant's contention, (B. 89), that the only thing planned was a robbery simply ignores the evidence presented and credited by the court below. Defendant concedes that the robbery plan itself was pre-planned, with Defendant contacting Luis and procuring his participation in a plan to obtain thousands of dollars from the Josephs in cash, jewelry and coins. Defendant relies on Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992), arguing that the mere fact that the robbery was pre-planned does not establish CCP. Geralds is inapposite, however. In that case, the defendant offered a "a number of reasonable hypotheses" that the killing was not pre-planned. Id. There, the defendant obtained information about the victims' schedules to

avoid contact with them during the burglary. Here the "primary plan" required the victim's presence.[43] Geralds also cited evidence of a struggle. Here, there was no such evidence. Indeed, after Luis struck Bea, which he asserted was not intentional, the elderly victims were cooperative. The Court in Geralds also cited the fact that the weapon was one of opportunity, a kitchen knife found at the scene. Here, although the gun used by Luis was found at the scene, Defendant had previously obtained and brought with him not one, but two guns, one of which he used to kill the Josephs. Furthermore, it was wholly undisputed that Defendant was well-known to the Josephs, as they were his resident landlords. That being the case, there would have been little point to him procuring two pairs of surgical gloves in advance for both him and Luis to avoid leaving fingerprints,[44] unless he intended to leave no witnesses behind. Further, the Josephs were shot point-blank while seated at the table in their dining room. Defendant then ordered Luis, at gun

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[43] As noted, the "primary plan" consisted of Luis telling the Josephs that a friend of his was holding Defendant's family hostage. The evidence, however, strongly suggests that Defendant never intended to follow that plan, and that it was merely a ruse to obtain Luis's involvement. For example, despite having just told Luis that Luis would be doing the talking, Defendant jumped in front of him and began to explain the "hostage" story when Sam answered the door. Defendant then immediately pushed his way in, suggesting that the plan followed, the so-called back-up plan, was in fact the true "primary plan."

[44] At the time of the crimes Defendant already had had numerous arrests and convictions and the authorities would therefore have had his fingerprints on file.

point,[45] to shoot Genevieve Abraham, whom Luis was standing directly behind at the time. Luis then tossed his gun to Defendant and departed. All three victims appeared to be dead after the first shot. Luis only witnessed the one shot to each victim, yet when the police arrived, each had been shot twice. Defendant told his wife that he had made sure they were dead.[46] This evidence clearly

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[45] This stratagem also ensured that Luis would not report the crime.

[46] Defendant's contention, (B. 92), that the trial court improperly considered this evidence is wholly without merit. As Defendant noted in his argument regarding Point V, hearsay is admissible at the penalty phase so long as the defense has the opportunity to rebut it. Here, the defense cross-examined not only the declarant, who denied the truth of the statement and claimed that the police coerced her into giving it, during which the defense elicited an improbable alibi story, but also the detective who took the statement. The trial judge had the benefit of considering the circumstances under which the statement was made, the declarant's in-court demeanor, and the improbable nature of her claims, and was fully justified in concluding that Cookie was lying in court and had told the police the truth. See Point V, supra.

Defendant relies for his contention on Dudley v. State, 545 So. 2d 857 (Fla. 1989). The State has located only one other case, Morton v. State, 689 So. 2d 259 (Fla. 1997), in which Dudley was applied to the penalty phase. In neither case was the rule in §921.141(2), Fla. Stat., which permits hearsay that the defense has the opportunity to rebut to be admitted as substantive evidence in the penalty phase, discussed. Presumably properly admitted substantive evidence may be used for any purpose. The State submits that as such, Dudley and Morton, at least to the extent that they are applied to the penalty phase, have overlooked §921.141(2), and are incorrect statements of the law.

In any event, this case is in no way comparable to those cases. Here, the evidence was not argued as substantive evidence during the guilt phase; indeed, both the court and the State informed the jury that it could be considered for impeachment purposes only. (T. 3257, 3446-51). Further, the court specifically noted that Cookie was not called solely for the purpose of

provides that "something more" that was lacking in the cases upon which Defendant relies.

Defendant's claim that his anger at Sam Joseph precludes the finding that the murder was CCP is without merit. While the argument and Defendant's displeasure when Luis found Sam's gun may have hastened Sam's death by a few minutes,[47] the evidence discussed above fully supports the trial court's conclusion that these murders were the product of heightened planning. Nor was there any evidence, regardless of his anger, that Defendant was particularly distraught, remaining in the apartment for several minutes after Luis left, presumably to deliver the coups de grace and take whatever loot he desired, after which strolled out to the car and then drove Luis to Miami Beach to dispose of the guns. This case is markedly similar to the Court's recent decision in Gordon v. State, 704 So. 2d 107 (Fla. 1997). In that case, the defendant and his accomplice broke into the victim's home allegedly looking for a

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impeaching her, the practice condemned in Dudley. (T. 3275-76). At the penalty-phase, the State did not mention this evidence at all to the jury. Finally, unlike Dudley and Morton, the brief statement to Cookie was not the sole or primary evidence of CCP. On the contrary, it was merely cumulative to the other evidence such as the guns, the gloves, and the fact that Defendant delivered a second shot to each victim at a time when they outwardly appeared to be already dead. Thus, even if the trial judge should not have relied on this evidence, the fact remains that she had ample other evidence from which to conclude that CCP applied.

[47] Notably, Defendant was not having an argument with Bea, whom he also summarily shot, nor Genevieve, whom he ordered Luis to "off."

piece of paper. The Court rejected Gordon's reliance on Geralds, noting that:

> [A]ssuming that [the defendants] were truly planning a burglary, a reasonable hypothesis would be that they would want to break into the [the victim's] apartment when he was not home to take the "piece of paper" they were allegedly seeking. If that was their goal, they would probably want to focus their energies on finding that paper and taking any valuables, rather than confronting an occupant who could possibly have a gun,[48] phone 911, etc. ... Instead they waited for him to return home before executing their plan, a critical fact we must consider in determining this issue.
>
> Alternatively, if the defendants were planning a robbery, they could have just as certainly achieved their aims after binding, gagging, and hogtying [the victim]. Obviously he was in no position to resist any robbery at that point. Furthermore, since they found the "piece of paper" they were allegedly seeking, and [the victim] was powerless to resist them, they had no reason to kill him unless that is what they intended to do all along.
>
> * * *
>
> Accordingly we do not believe Gordon has proffered any reasonable hypothesis of what may have happened other than a plan to rob and murder [the victim].

Gordon, 704 So. 2d at 115-16 (emphasis the Court's). Here, although the 70 to 80 year-old victims were not hogtied, they were clearly under control and Defendant and Luis alternately ransacked the apartment without any attempt by the victims to stop them. Indeed, Genevieve offered them her jewelry and begged them to leave.[49] The

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[48] A very likely possibility in Miami-Dade County; and indeed, Sam had a gun.

[49] The record also indicates that packing tape was found in the middle the living room (apparently from the Josephs' holiday preparations) that Defendant could easily have used to restrain the elderly victims.

same reasoning thus applies here, except, of course, there is the additional factor that Defendant was well-known to his victims. See Gamble v. State, 659 So. 2d 242, 244 (Fla. 1995)(CCP upheld where defendant used ruse to gain entry to landlord's home, where he killed and robbed the landlord). The trial court properly found this factor.[50] See also Trepal v. State, 621 So. 2d 1361, 1367 (Fla. 1993)(CCP properly found where evidence showed advance procurement of weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course); Brown v. State, 565 So. 2d 304, 308 (Fla. 1990)(prior procurement of weapon supported CCP); Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990)(same); Swafford v. State, 533 So. 2d 270, 277 (Fla. 1988)(CCP properly found where evidence showed advance procurement of weapon, lack of resistance or provocation, the appearance of a killing carried out as a matter of course); Remeta v. State, 522 So. 2d 825, 829 (Fla. 1988)(CCP proper where evidence established advance planning including intent to eliminate witness).

Finally, even, assuming arguendo that the evidence did not

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[50] Although not specifically addressed by Defendant, the CCP evidence applies to the murder of Genevieve Abraham as well as to the Josephs. Although Defendant may not have known she would be there his pre-formed intent to kill the Josephs makes the aggravator applicable to the Abraham murder as well through the doctrine of transferred intent. See Howell v. State, 23 Fla. L. Weekly S90, S93 (Fla. Feb. 12, 1998)(doctrine of transferred intent applies to CCP); Sweet v. State, 624 So. 2d 1138, 1142 (Fla. 1993)(same); Provenzano v. State, 497 So. 2d 1177, 1183 (Fla. 1986)(same).

support the finding of CCP, any error would be harmless beyond a reasonable doubt.[51] As noted above, the trial court stated that it would follow the jury's 12-0 recommendations and impose death even without the CCP or avoid-arrest aggravators. Moreover, the remaining aggravation in this triple murder of three elderly persons in their home was weighty, including Defendant's appalling number of prior violent felonies, and the mitigation was minimal, with no statutory mitigators, with the trial court only giving Defendant "the benefit of the doubt" in finding the non-statutory mental health mitigation See, Hill v. State, 643 So. 2d 1071, 1074 (Fla. 1994)(erroneous finding of CCP harmless where remaining aggravation outweighed mitigation); Young v. State, 579 So. 2d 721, 724 (Fla. 1991)(same). Defendant's sentence should be affirmed.

IX.

THE TRIAL COURT PROPERLY DETERMINED THAT THE AVOID-ARREST AGGRAVING CIRCUMSTANCE APPLIED.

Defendant's final contention is that the trial court misapplied the avoid-arrest or witness elimination aggravator. The evidence abundantly established that there was no reason for the killing of these victims, who were well known to Defendant, other than to eliminate the only witnesses to the crime.

As with his argument pertaining to the CCP aggravator,

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[51] Defendant concedes as much in his brief, acknowledging that the trial court stated that it would impose death even without this factor, and making his prayer for relief contingent on the finding of "other" harmful penalty-phase error. (B. 94).

Defendant again fails to note the persuasive evidence that this crime was something more than a robbery gone awry.[52] Simply put, if Defendant did not intend, in advance, to kill the victims, who knew him well and could clearly identify him, why would he have procured and used two pairs of surgical gloves to avoid leaving fingerprints? Why did he kill these small elderly people, who were not resisting, other than to eliminate them as witnesses? Why did he order Luis to "off" Mrs. Abraham, when she was offering him her jewelry, other than to eliminate her as a witness?[53] Why would he adroitly involve Luis as a co-killer, except to forestall Luis's going to the authorities? There simply are no reasonable answers to these questions, other than that Defendant never intended to leave any witnesses, and was true to his intent. This factor was properly found. See Stein v. State, 632 So.2d 1361 (Fla. 1994)(avoid arrest and CCP properly found where evidence showed defendant planned to eliminate witness to avoid arrest by procuring murder weapon in advance, where there was lack of resistance, and where the killing appeared to be carried out as matter of course); Herring v. State,

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[52] As with the CCP aggravator, Defendant also claims that the trial court improperly credited Cookie's statement that he had made sure the victims were dead. As discussed above, consideration of this evidence in the penalty phase was proper, and if not, merely cumulative. See n.46, supra.

[53] She was found with the necklace she had been wearing in her hand. Also of note, she and the Josephs conversed in a language, presumably Arabic, that Defendant did not speak after she arrived. Defendant could reasonably have concluded that they were telling her that Defendant was their tenant.

446 So.2d 1049 (1984), denial of post-conviction relief reversed on other grounds 580 So.2d 135 (Fla. 1991)(evidence that defendant shot victim and then shot him again after he was disabled was sufficient to establish that defendant's intent to kill victim to eliminate him as a witness); Howell v. State, 23 Fla. L. Weekly S90, S93 (Fla. Feb. 12, 1998)(that defendant may have had additional motives for killing witness did not preclude application of avoid-arrest aggravator where intent was clear); Fotopoulos v. State, 608 So. 2d 784, 792 (Fla. 1992)(same); Clark v. State, 443 So.2d 973 (Fla. 1983)(State met burden of proving that dominant or exclusive motive for killing of victim was elimination of witness, where victim could identify defendant, victim knew that defendant had just committed violent felony on her husband, and victim was helpless to thwart defendant's further taking of property); Preston v. State, 607 So. 2d 404, 409 (Fla. 1992)(aggravator proper where other evidence showed that killing was not merely spur-of-the-moment; factor may be proved by circumstantial evidence); Thompson v. State, 648 So. 2d 692, 695 (Fla. 1994)(same); Harmon v. State, 527 So. 2d 182 (Fla. 1988)(same); Swafford v. State, 533 So. 2d 270 (Fla. 1988); Cave v. State, 476 So. 2d 180, 188 (Fla. 1985), sentence vacated on other grounds, Cave v. Singletary, 971 F.2d 1513 (11th Cir. 1992)(same); Routly v. State, 440 So.2d 1257 (Fla. 1983)(defendant knew that victim knew him and could later provide police with his identity, had no logical reason for taking certain

actions, except to prevent detection); Lightbourne v. State, 438 So.2d 380 (Fla. 1983)(victim known to defendant). No error occurred.

Moreover, even if the trial court erred in finding this circumstance, any error would be harmless beyond a reasonable doubt, for the same reasons discussed with regard to the CCP factor, supra, at Point VIII.[54]

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[54] Although not raised by Defendant, his sentence is proportional. See Lowe v. State, 650 So. 2d 969 (Fla. 1994)(prior conviction of a violent felony and murder committed during the attempted robbery; mitigation evidence that defendant was 20 years old at time of crime, functioned well in controlled environment, was a responsible employee, and participated in Bible studies); Heath v. State, 648 So. 2d 660 (Fla. 1994)(commission of murder during the course of an armed robbery and prior conviction for second-degree murder; substantial mitigating factors, including extreme mental or emotional disturbance, and minimal nonstatutory mitigation); Smith v. State, 641 So. 2d 1319 (Fla. 1994)(murder committed during an attempted robbery and a previous conviction for a violent felony versus no significant history of criminal activity and several nonstatutory mitigating circumstances relating to Smith's background, character and record); Watts v. State, 593 So. 2d 198 (Fla. 1992)(aggravators: prior violent felonies; murder during course of sexual battery; murder committed for pecuniary gain; mitigation: low IQ reduced judgmental abilities; defendant 22 at time of offense); Riechmann v. State, 581 So. 2d 133 (Fla. 1991)(aggravating factors of murder committed for pecuniary gain and cold calculated and premeditated; minimal nonstatutory mitigation); Cook v. State, 581 So. 2d 141 (Fla. 1991)(murder committed for pecuniary gain and robbery merged into one factor; defendant previously convicted of another capital felony; mitigation included absence of significant prior criminal activity); Freeman v. State, 563 So. 2d 73 (Fla. 1990)(murder committed for pecuniary gain and during burglary merged into one factor; previous violent felony convictions; nonstatutory mitigation including low intelligence and abuse by stepfather); Hudson v. State, 538 So. 2d 829 (Fla. 1989)(previous conviction of violent felony; murder committed during armed robbery; minimal weight given to statutory mitigating factors of extreme mental or emotional disturbance, impaired capacity to conform conduct to

CONCLUSION

For the foregoing reasons, the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to **SCOTT W. SAKIN**, Esq., 1411 Northwest North River Drive, Miami, Florida, 33125, this 1st day of May, 1998.

RANDALL SUTTON
Assistant Attorney General

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requirements of law, and age of defendant). In view of the foregoing, the imposition of the death sentence here is clearly proportionate with death sentences approved in other cases.