IN THE SUPREME COURT OF FLORIDA

CASE NO. 90,153

MANUEL ANTONIO RODRIGUEZ,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

INITIAL BRIEF OF APPELLANT

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INTRODUCTION

In the trial court, the Appellant, Manuel Antonio Rodriguez, was the defendant and the Appellee, the State of Florida, was the prosecution. In this brief, the parties will be referred to as they stood before the lower court. The symbols "R" and "T" will be used to refer to portions of the record on appeal and trial transcript, respectively. All emphasis supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

On September 15, 1993, an indictment was filed charging the defendant with three counts of first degree murder and one count of armed burglary with an assault or battery. (R. 5-8).

On March 2, 1995, a hearing on the defendant's Motion to Suppress Statements was convened before the Honorable Leslie B. Rothenberg, Circuit Judge. (R. 47, 61, 62). At the hearing, Metro-Dade Detective Greg Smith testified that he was assigned to investigate the homicide deaths of Genevieve Abraham, Sam Joseph and Bea Joseph as part of his work on the "cold case" squad in March of 1992.[1] (T. 34-36). Based upon information that the police had received from informants who knew Luis Rodriguez,[2]

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[1] Smith stated that he worked briefly on the case at the time of the homicides in December, 1984. (T. 35).

[2] Luis Rodriguez was also indicted for the same offenses with which the defendant was charged. (R. 5-8). Prior to trial, Luis Rodriguez entered into a plea agreement with the State in which he was permitted to enter a guilty plea to reduced charges of second degree murder, in return for his testimony against the defendant. Luis Rodriguez was sentenced to life imprisonment for his involvement in the homicides. (T. 2853, 2854).

(hereinafter, the co-defendant), the police believed that the co-defendant was a suspect in the homicides. (T. 240, 241, 249). On August 3, 1993, the co-defendant was contacted at his place of employment in Orlando, and was requested to voluntarily accompany the police to the Orange County Police Department to discuss the Miami homicides. (T. 42, 43). The co-defendant agreed to speak with the officers. (T. 44).

At the station, Smith and Metro-Dade Detective Jerrett Crawford spoke with the co-defendant for about an hour, during which they discussed the co-defendant's family and job history. (T. 48-51). Detective Crawford then falsely advised the co-defendant that the defendant had given the police a statement regarding the homicides and that the defendant had placed the blame for the killings on the co-defendant. (T. 259, 310, 311). In response, the co-defendant, showing a degree of resignation, stated that life in a jail cell would not be as bad as what he has had to live with. (T. 52, 311). The officers then read the co-defendant his *Miranda* rights and obtained a formal statement from the co-defendant, in which he implicated himself and the defendant in the three homicides. (T. 55, 63, 184).

Based upon the information received from the co-defendant, Detectives Smith and Crawford arranged to speak with the defendant at Tomoka Correctional Institution on August 4, 1993. (T. 194, 318). The officers told the defendant that they wanted to talk to him about a triple murder that had occurred in Miami. The defendant told the officers that he was aware of their purpose, because he had previously spoken with his common-law wife, Maria Malakoff. (T. 197, 198, 319, 320). Although the officers never read the defendant his *Miranda* rights, they talked with him at Tomoka for about an hour.

(T. 196-198, 323). In that time, the defendant informed the officers of his mental problems and that he was being medicated with psychotropic drugs. (T. 198, 321). After the officers had advised the defendant that the murders had occurred in an apartment building in which the defendant had once resided, the defendant told the officers a "bizarre" story about some doctors who had wanted to take over the building. (T. 323, 324). The interview with the defendant concluded when the defendant told the officers that he needed time to think about the danger to his family that the doctors' plot had engendered. (T. 274, 275, 324).

Following August 4, an arrest warrant for the three homicides was issued for the defendant. (T. 404). On August 13, 1993, the officers executed the arrest warrant by taking the defendant into custody at Starke[3]. (T. 199, 325). On the drive back to Miami, the defendant was secured by handcuffs and leg braces. (T. 203). Although the defendant was not questioned by the officers during the trip, the defendant did volunteer that he could not understand why the co-defendant would say that the defendant had killed two people. (T. 205-207, 327). Both Smith and Crawford maintained that they had not provided the details of the co-defendant's statement to the defendant before the defendant made the remark in the car. (T. 207, 327).

Upon their arrival at Metro-Dade Police Headquarters at 4:50 PM, the officers placed the defendant in an interview room. (T. 208, 209). When the defendant was read

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[3] Although the officers claimed that they were not aware of the reason for the defendant's transfer to Starke, which followed the officers' visit with the defendant at Tomoka, the officers noted that the defendant believed that the officers were responsible for the transfer. (T. 277, 386).

his rights, the defendant informed the officers that he had been given Trilafon and Benadryl at 6:00 AM that morning at Starke. (T. 213, 426). The officers noted that they had received no additional medication for the defendant from the personnel at Starke. Additionally, although the officers were aware that the defendant had been previously found to be mentally incompetent, the officers did not review the defendant's prison records or psychiatric reports before engaging the defendant in questioning. (T. 266, 278, 282, 328, 393). Instead, the officers relied upon the defendant's claim that the prescribed psychotropic medication simply made him nervous and restless. (T. 214). Noting that the defendant did not appear to be impaired, the officers had the defendant execute a written waiver of his *Miranda* rights. (T. 210-216, 287, 333).

Initially, the defendant denied any involvement in the charged homicides. (T. 217). Instead, the defendant informed the officers that he had gone to Homestead to steal fruit on the day of the homicides. When he returned home, he found that his wife, Maria Malakoff, had set off some bug bombs in their apartment. The defendant said that his family then left their apartment, went to his mother's home and then to the hospital to seek treatment for his daughter. (T. 432). The defendant also mentioned the plot involving the doctors that he had spoken of previously. (T. 331, 432). During the defendant's rendition of these stories, Detective Crawford told the defendant that he thought that he was lying. (T. 331).

Between 7:00 and 7:30 PM, Detective Crawford showed the defendant the co-defendant's statement. (T. 435, 436). The defendant then changed his story and told the officers that the co-defendant had come to his home complaining that he needed

money. (T. 331). The defendant told the co-defendant that the Josephs had money because they had just collected rent from their tenants. (T. 331, 332). The defendant said that the co-defendant then decided to rob the Josephs. (T. 331-332). The defendant agreed to knock on the Josephs' door to allow the co-defendant to gain entry to the Josephs' apartment. (T. 331, 332). The defendant maintained that the co-defendant was joined by his brother, Isidoro, before the robbery. The defendant claimed that after the co-defendant and Isidoro entered the apartment, the defendant heard shots. The three of them then fled from the area of the apartment. The defendant and the co-defendant subsequently went to Miami Beach, where the co-defendant disposed of the guns used in the robbery. (T. 218-222, 331, 332).

Throughout his conversations with the officers, the defendant consistently maintained that he did not shoot anyone in the Josephs' apartment. (T. 219, 438). At the conclusion of the defendant's oral statement at 8:30 PM, the defendant declined the officers' request to give a formal, stenographically recorded statement. (T. 222, 332, 444).

At the conclusion of Detective Crawford's testimony, the defense argued that the State had failed to establish that the defendant had freely and voluntarily waived his rights before speaking to the Metro-Dade officers. Specifically, the defense claimed that by ignoring the defendant's mental deficits, the officers were able to obtain a statement from the defendant by overcoming the defendant's will through persistent questioning. The result, the defense claimed, was an involuntarily given statement. (T. 466-470).

The trial court granted the defendant's suppression motion in part and denied the motion in part. (R. 349-364). The court suppressed the statements made by the

defendant at Tomoka. Although the defendant was a suspect and in custody, the officers failed to read the defendant his *Miranda* rights before speaking with the defendant. (T. 509-510). The court also found that the police had not used coercion to obtain the Tomoka statements. (T. 510). The court denied suppression of the defendant's statements made to the officers during the ride from Starke to Miami, since those statements were volunteered. (T. 512). The court also denied suppression of the statements made by the defendant to the police at police headquarters. The court found that the previous *Miranda* violation did not affect the voluntariness of the defendant's subsequent statement, since the police had not utilized coercion to obtain the earlier statements. (T. 517-519). The court also found that the State had established that the defendant was alert at the time of his statement and that the medication that he had been taking had not impaired him so as to render his statement involuntary. (T. 513, 514).

On October 7-24, 1996, a jury trial was convened before the Honorable Leslie B. Rothenberg, Circuit Judge. (R. 530-33, 541-48, 560-61, 590-93, 649-51, 661-62, 670-72, 756-58, 810-12, 859-62).

Following voir dire questioning, the defense sought to exercise a peremptory challenge against prospective juror, William Borges. (T. 1645). The State requested an inquiry, citing the fact that the juror was a Hispanic male. (T. 1645). The defense responded by noting that Borges had previously been arrested for carrying a concealed firearm and had been referred to a program presumably run by the State Attorney's Office. (T. 1645, 1646). Defense counsel expressed concern that Borges might feel that the State Attorney had helped him in his case and that he might owe the State Attorney a debt of

gratitude. (T. 1646-47). Additionally, defense counsel noted some concern about Borges' mental abilities, Borges' youthful age (28) and the composition of the jury panel. (T. 1646). The State countered by noting that there were other jurors remaining on the panel who had previously been arrested and that defense counsel's concern about the panel's composition was an effort by the defense to discriminate. (T. 1646-47). The prosecutor also noted that neither party had directly asked Borges about his feelings towards the State Attorney's Office. (T. 1647). The court rejected the defendant's peremptory challenge of Borges, finding that the strike was racially motivated and pretextual. (T. 1647). The court's apparent basis for its determination that the challenge was racially motivated was the fact that there were other jurors remaining on the panel with arrest records who had not been challenged by the defense. (T. 1647, 1648). The court concluded that the challenge was pretextual because the defense had not asked the juror questions about any special feeling the juror might have towards the State. (T. 1648).

The State subsequently moved to strike juror Simone Duval for cause. (T. 1653). The State claimed that Duval could not be fair because she could not return a guilty verdict based upon the testimony of a co-defendant. (T. 1653). Both the defense and the court recalled that Duval had said that she could be a fair juror on that issue. (T. 1653). The court then recalled Duval. Under questioning by both the court and the prosecutor, Duval reassured the court that she could fairly evaluate the co-defendant's testimony and that she could rely upon the testimony of a co-defendant to return a guilty verdict. (T. 1654, 1655). Duval firmly denied having said that she would have trouble believing a co-defendant's testimony. (T. 1655, 1656). After the judge denied the State's

cause challenge of Duval, the State sought to exercise a peremptory challenge against Duval. (T. 1656). The defense asked for an inquiry, noting that Duval was a black female. (T. 1656). At the court's behest, the State responded that its strike was based upon the juror's seeming confusion about the proceedings and her inability "to follow all the nuances of our conversations." (T. 1656-1658). The defense responded that Duval had answered all questions directed to her appropriately, albeit with a quiet voice. (T. 1658). Noting that Duval had been asked only a few questions which had been mostly leading in nature, the court nevertheless permitted the State's challenge, finding that Duval seemed to have difficulty following and understanding the court's questioning. (T. 1659).

At the conclusion of jury selection, the defendant renewed all of his previous objections and motions made during the selection process. (T. 1662). The court overruled the defendant's objections and specifically noted that the defendant's objections were preserved for the record. (T. 1662).

Virginia Nimer, Genevieve Abraham's sister, testified that she had made plans to have dinner with Mrs. Abraham at 7:30 PM on December 4, 1984. (T. 1752-56). When Nimer last saw her sister at 6:30 PM, Mrs. Abraham was wearing a pearl necklace, a wedding ring, a diamond watch and earrings. (T. 1756-1758). Nimer stated that Mrs. Abraham did not appear for dinner as scheduled. (T. 1761).

At 11:00 PM, Nimer and Mrs. Abraham's housekeeper went to the home of Bea and Sam Joseph looking for Mrs. Abraham. (T. 1763). At the Josephs' apartment, Nimer noted that the apartment door was left slightly ajar. (T. 1766). Nimer went inside the apartment and found the Josephs and Mrs. Abraham dead. (T. 1775, 1789). Nimer noted

still contained money and credit cards. (T. 1955). Finally, Casey found nothing to indicate that the living room pillows had been used during the shootings. (T. 1964-65).

Casey also made a number of observations regarding the three victims and the area immediately surrounding their bodies. Casey noted that Mrs. Abraham had abrasions to her wrist and neck, which were consistent with wounds caused by the forcible removal of jewelry. (T. 1903, 1904). Mrs. Joseph had a cut lip and a bloody tissue in her hand. (T. 1906, 1913-14). Mr. Joseph's body was found near a credenza, which had been stained by blood spatter. (T. 1912).

While Casey worked the crime scene, Detective Kenneth Loveland did an area canvass of the other apartments in the Josephs' apartment building. At 1:30 AM, Loveland found that no one answered in response to his knock on the door of apartment #3.[5]

Ray Freeman, a Metro-Dade firearm examiner, testified that he received three spent projectiles from James Casey for examination. These three bullets, marked "A", "B" and "C", had been recovered from the dining room area of the apartment and from the clothing of Mr. Joseph. All three bullets were .22 caliber and had likely been fired by the same gun. (T. 1991-2001).

Freeman also examined four bullets that were provided to him by the medical examiner. (T. 2001-02). Bullet "D", a .22 caliber bullet, had been removed from Sam Joseph's head and had been fired by the same gun that had fired bullets "A" and "B". (T.

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[5] The defendant and his family resided in apartment #3 at the time of the homicides. (T. 2690).

2010). Bullet "E", a .38 caliber bullet, had been removed from the body of Bea Joseph. (T. 2010-11). Bullet "F", a .38 caliber bullet, had been removed from Mrs. Abraham's shoulder. (T. 2014). Freeman found that bullets "E" and "F" had similar markings, which led him to believe that they had been fired by the same weapon. (T. 2015). Bullets "E" and "F" were similar to the .38 caliber ammunition found in the Josephs' apartment. (T. 2044). Bullet "G", a .22 caliber bullet, was removed from the body of Mrs. Abraham and had been fired by the same gun that had fired the other .22 caliber bullets. (T. 2016, 2040-41). In Freeman's opinion, a minimum of two and a maximum of four guns had been used to fire the bullets that he had examined. (T. 2052).

Finally, Freeman noted that a .38 caliber pistol expels a greater amount of gunpowder than a .22 caliber firearm. As a result, Freeman would expect to find that a .38 caliber weapon would cause a greater amount of stippling than a .22 caliber weapon. (T. 2025). Freeman testified that a .22 caliber gun would cause stippling if fired from a distance of one to four inches from a surface. (T. 2028). In the case of contact wounds, Freeman stated that an examiner would expect to find gunpowder in the bullet hole. (T. 2042-43).

Bernard Brewer, a Metro-Dade fingerprint examiner, testified that he compared the latent prints that he received in this case with the standard fingerprints of the defendant. (T. 2077-79). Brewer found that none of the latent fingerprints matched the defendant. (T. 2082). Brewer also examined the dining room shades from the Josephs' apartment and found no fingerprints on the shade belonging to the defendant. (T. 2083). Brewer added that there were still four latent fingerprints from the scene that remained

unidentified. (T. 2088).

Anastasia Elisia Rodriguez, the mother of the co-defendant and Maria Malakoff, testified that she was living in a trailer in December, 1984, when she heard about the homicides charged in this case. (T. 2101). Sometime later, Rodriguez saw a yellow paper bag under her trailer. (T. 2102-2104). Rodriguez looked inside the bag and saw a watch band and a "buffalo" nickel. (T. 2105). Although she was frightened by what she had found, Rodriguez did not call the police. Instead, she called her son, Isidoro, in Orlando and asked for his help in disposing of the bag. (T. 2109-10, 2127). Rodriguez kept the bag hidden until Isidoro was able to come to Miami. (T. 2110).

At some point, the defendant and Rodriguez' daughter, Maria Malakoff, came to her house looking for the bag. (T. 2111). When Rodriguez went outside to speak with them, she noted that the defendant appeared to be angry. (T. 2113). Malakoff then asked her about a yellow bag that "they" had left at the trailer. (T. 2115-16). Rodriguez did not let on to her daughter that she had found the bag. (T. 2115). Rodriguez stated that Isidoro subsequently came to Miami and took the bag from her. She has not seen the bag or its contents since. (T. 2116).

Rodriguez also testified that she had once heard the defendant say that he had been inside the Josephs' apartment to make some repairs. (T. 2116). Rodriguez said that the defendant had commented on the collections that he had seen inside the apartment. (T. 2117).

Rodriguez stated that she was aware that her son, the co-defendant, had been arrested for the murders in this case. (T. 2123). Rodriguez said that her son had

maintained his innocence to her before he pled guilty to the charges. (T. 2124). Rodriguez added that she loves her son and that she has visited him regularly at the police station and at the jail. (T. 2121, 2124).

William Venturi, the Metro-Dade detective originally assigned as the lead detective on the Abraham case, testified that during his investigation, he followed up on all leads received by the homicide unit. (T. 2160-2162, 2176). On July 4, 1985, he met with a tipster who had identified himself as Antonio Chait. (T. 2177-78). Chait indicated to Venturi that he had resided in apartment #3 in the apartment house where the homicides had occurred. (T. 2178). Venturi had Detective Crawford check out Chait's identification information. Crawford reported that Chait was really the defendant and that the defendant had a police ID number. (T. 2179). Venturi stated that he spoke with the defendant on a later date. At that time, the defendant told him that he had seen two men run from apartment #9; one of them was known to the defendant as Juanito. (T. 2180-81). Venturi had Detective Daniel Borrego check the information provided by the defendant. Borrego determined that Juanito was not involved. (T. 2151-55, 2181).

Venturi also followed up a lead that was provided by a man who identified himself as Antonio Traves on November 25, 1985. (T. 2182). Venturi noted that the man who had identified himself as Traves was the same man who had identified himself as Chait four months earlier. (T. 2182-83). When Venturi confronted "Traves" with the notion that "Traves" was a false name, the defendant admitted that he had lied to the officer in July. (T. 2183). The defendant told the officer that he needed the officer's help. The defendant then told the officer that between 6:00 PM and 7:00 PM on the day of the

homicides, he had observed a man named Geraldo leaving from the area of the Josephs' apartment house. (T. 2184-86). The defendant stated that Geraldo resembled the composite drawing that had been published by the police and that Geraldo had left the scene in a white Camaro. (T. 2186).

On November 29, 1985, Venturi met with the defendant again and advised him that the police had investigated the information he had provided and had determined that the information was not worthy. (T. 2187-88). Venturi then accused the defendant of a crime and advised the defendant of his rights. (T. 2188-89). Venturi also told the defendant that he thought that he was involved in the Abraham homicides. (T. 2192). The defendant then admitted to Venturi that he had lived in the Josephs' apartment building, that he had worked for the Josephs and that he had felt that Mr. Joseph was a stingy man. (T. 2192). The prosecutor then asked Venturi:

> Q: I need you to describe to what ever extent you can, your observations as to what you could see as soon as you said to the defendant that you thought that he was involved and wanted to know if he could tell you what he was involved in?

Venturi responded:

> A: I just asked him, I said, listen, at this time after various versions are you willing to tell me what really happened in there and what your participation was in the homicide. And at that time the man bowed his head down and he just began to cry. There was some silence there and again I just felt that at this point I had to continue with my interrogation, but he refused to answer my [sic] more of my questions.
>
> Q: Was that the end of the interview for all practical purposes?
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> A: Yes. He was getting sick, so we ended the interview.

> Q: When you say sick, did you see him physically become sick or did he tell you he was becoming sick?
>
> A: He was shaking. I don't know if it was from crying or illness. He said he was an epileptic to, or from his medicine, and at that time we terminated the interview.

(T. 2193-94).

At the conclusion of Detective Venturi's direct examination, the defense objected to Venturi's reference to the fact that the defendant had a police ID number, thereby implying that the defendant had a prior record, and to the fact that the defendant had invoked his right to remain silent. The defense moved for a mistrial on both grounds. (T. 2199). The court commented that Venturi's remark was "close enough that it could appear [sic] a comment on his right to remain silent. I don't think it was absolutely a comment on his right to remain silent. But the way it was phrased, it certainly is open to speculation." (T. 2200). The court offered to read the jury a curative instruction or to have Venturi clarify the reason for the termination of the interview with the defendant. (T. 2200). The defendant declined the court's offer, noting that either suggestion would highlight the impropriety for the jury. (T. 2200-01). Although finding that Venturi's comment was improper, the court opined that Venturi had cured the taint by referring to the fact that the defendant was not well. (T. 2201). The court denied both of the defendant's mistrial motions. (T. 2201-02).

Detective Crawford testified that he assumed the role as lead investigator of this case after the retirement of Detective Venturi. (T. 2219-22). Crawford was advised in

March, 1992, that Rafael Lopez[6] had information about the Abraham homicides. (T. 2223). Crawford spoke with Lopez and received the names of people who might have been involved in the crimes. (T. 2224). Based upon the information received, Crawford checked the homicide file and found that the defendant and Malakoff had been residing in apartment #3 at the time of the homicides. (T. 2225). Crawford also learned that the police had contact with the defendant in the past. (T. 2225). Crawford and the prosecutor then had the following exchange:

> Q: And were there other names that this person had used in past contact with the police?
>
> A: Yes.
>
> Q: How many other names, just in terms of this investigation alone?
>
> A: Ten.

(T. 2225-26). The defendant immediately objected and moved for a mistrial, maintaining that Crawford's reference to the defendant's use of ten false names clearly informed the jury of other acts of misconduct, which served to destroy the defendant's presumption of innocence. (T. 2226). The prosecutor stated that he expected Crawford to testify that the defendant had used two false names, but offered to ask Crawford additional questions to clarify the matter. (T. 2226). The defendant rejected the prosecutor's offer, expressing concern as to the explanation to be provided regarding such a sensitive matter. (T. 2227). The court then denied the defendant's mistrial motion. (T. 2229). Outside the presence

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[6] Rafael Lopez' sister, Velia Rodriguez, is married to Isidoro Rodriguez, the brother of the co-defendant and Maria Malakoff, the defendant's common law wife. (T. 2224).

of the jury, Crawford indicated that he had misunderstood the prosecutor's question and that the correct answer to the question was two. (T. 2229-30). The defendant then declined the court's offer of a curative instruction, fearing that highlighting the problem would not serve a constructive purpose. (T. 2231-32).

Crawford stated that based upon the information received from Lopez, he and other officers traveled to Orlando and made contact with the co-defendant. (T. 2234-36). The co-defendant agreed to talk to them about the Abraham homicides. After an hour of conversation with the co-defendant, Crawford falsely told the co-defendant that he had talked with the defendant and that the defendant had blamed the co-defendant for the homicides. (T. 2256-57, 2280, 2336). The co-defendant responded by stating, "Putting me in a cell will never be as bad as living with what I did." (T. 2281-82). Crawford then obtained a sworn statement from the co-defendant. (T. 2284).

The following day, Crawford met with the defendant at 11:00 AM. Crawford advised the defendant that the officers were investigating a triple homicide in Dade County that had occurred in December, 1984. (T. 2290, 2294). The defendant told Crawford that Malakoff had told him that the police were contacting his family members. (T. 2295). During his hour conversation with the defendant, Crawford noted that the defendant did not act in a bizarre manner and was able to have a normal conversation. (T. 2295-96).

The defendant was arrested for the Abraham homicides on August 13, 1993.[7] He was then transported to Miami in handcuffs, a waist restraint and leg braces. During

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[7] Crawford conceded that at the time of the defendant's arrest, the police had no physical evidence tying the defendant, or anyone else, to the homicides. (T. 2356, 2359).

the trip, the defendant did not act abnormally. (T. 2299-2302). After arrival at the Metro-Dade Police Headquarters, the defendant was placed in an interview room and the restraints were removed from the defendant. (T. 2303, 2307, 2314). The defendant was then read his *Miranda* rights and he waived those rights. (T. 2313-15). In his hours long interview with the defendant, Crawford claimed that he was told several stories by the defendant.[8] (T. 2318-19). Crawford said that when he told the defendant that he did not believe his story, the defendant would change it. (T. 2318-19). Crawford stated that while the defendant did talk to him about the medication that he had been taking, the defendant appeared normal to him. (T. 2321).

Crawford testified that after the co-defendant's arrest, the co-defendant was brought to police headquarters on at least five to ten occasions to permit him to have contact visits with his family. (T. 2308-10). The visits were social in nature and occurred outside the presence of a police officer. (T. 2343-45). On at least one occasion, the co-defendant was allowed to visit alone with his wife. (T. 2354).

Detective Ramesh Nyberg and Officer Oscar Roche described attempts by the Metro-Dade underwater recovery team to locate firearms that had allegedly been thrown into a Miami Beach canal by the co-defendant. On August 5, 1993, divers made numerous attempts to recover the guns at a location selected by the co-defendant. (T. 2385-88, 2396-98). The recovery attempts were unsuccessful. (T. 2401).

Isidoro Rodriguez, the co-defendant's brother, testified that in December,

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[8] The defendant renewed his pre-trial objection to the admissibility of his statement to the police. Again, the court overruled the objection. (T. 2316).

1984, he received a call from his mother, Elisia Rodriguez, about a bag that she had found underneath her trailer. (T. 2420-22, 2432-34). Mrs. Rodriguez told him that the bag contained coins and jewelry and that she wanted him to dispose of the bag. (T. 2435). Isidoro retrieved the bag from his mother and found that it contained some costume jewelry, a watch band and five to eight small coins. (T. 2515-17). Isidoro disposed of all of the property except for one coin, which he hid in a planter. (T. 2515-16). When the police requested that he turn the property over to them, he was unable to locate it. (T. 2516).

Isidoro added that he was working on a job in the Orlando area on December 4-5, 1984. (T. 2478). Isidoro produced records that he kept for his business that verified his employment activity on those days. (T. 2476-88).

Dr. Valerie Rao, an associate medical examiner in Dade County, testified that Dr. Charles Wetli had performed the autopsies of the Josephs and Mrs. Abraham. Dr. Rao reviewed Dr. Wetli's records prior to her courtroom testimony. (T. 2548-2556).

Dr. Rao stated that Mrs. Abraham had two gunshot wounds to her head area. The first wound was located above her left eyebrow and bore stippling. (T. 2569-70). The bullet causing the wound traveled from front to back, but did not strike Mrs. Abraham's brain. (T. 2572-73). The wound would not necessarily have been fatal. (T. 2575). The bullet causing the wound was recovered and turned over to the police. (T. 2576). Mrs. Abraham's second wound was caused by a bullet entering her mastoid area on the right side of her head. The bullet traveled down through her neck, tore her spinal cord and lodged in her shoulder. (T. 2581-84). This second bullet likely caused Mrs. Abraham to

expire quickly. (T. 2585).

Dr. Rao stated that Bea Joseph had a mouth injury, which likely resulted from a direct blow to her mouth by a fist or an elbow. (T. 2602-04). Mrs. Joseph also had a gunshot wound to the forehead. The bullet entered her forehead and went through her brain. (T. 2609-11). Dr. Rao opined that the gunshot to the head would have resulted in the quick death of Mrs. Joseph. (T. 2611). Dr. Rao also found a superficial, graze gunshot wound to the back of Mrs. Joseph's neck. (T. 2612, 2617). Dr. Rao opined that Mrs. Joseph would not have received the graze wound while lying down. (T. 2619).

Dr. Rao found that Sam Joseph had received four gunshot wounds. (T. 2623). Mr. Joseph had an entrance and exit wound in his left hand. Those wounds were characterized as defensive wounds, which were consistent with Mr. Joseph attempting to shield his face with his hands. (T. 2623-25). Dr. Rao also found a through and through wound to Mr. Joseph's left shoulder. (T. 2626). Finally, Dr. Rao found two gunshot wounds to Mr. Joseph's cheek. (T. 2629-31). One of the bullets causing these wounds, a .22 caliber, pierced Mr. Joseph's cranial cavity and was fatal to Mr. Joseph. (T. 2633-35, 2642-43). The second bullet passed through soft tissue and exited out the base of Mr. Joseph's neck. (T. 2636). Dr. Rao found stippling at the site of the cheek wounds. (T. 2636).

Maria Malakoff testified that she has known the defendant since they were thirteen years of age. During their relationship, the defendant and Malakoff had two children. (T. 2690). Malakoff stated that members of her family did not like her or the defendant, unless they were able to give her family members money. (T. 2709, 2726).

Malakoff claimed that she did not get along with her mother, Elisia, for that reason. (T. 2709). Malakoff claimed that her relationship with her family was complicated by the fact that her children were frequently ill. In 1984, one of the children died. (T. 2710, 2728).

Malakoff testified that in 1984, she resided with the defendant in apartment #3 of the apartment house managed by the Josephs. (T. 2690-91). Malakoff claimed that the defendant had never worked for the Josephs and had never gone inside the Josephs' apartment. (T. 2691). Malakoff stated that the defendant was not upset with Sam Joseph. (T. 2692). At that point, the State impeached Malakoff with a sworn statement that she had given to the police on August 9, 1993. (T. 2692-94). In her police statement, Malakoff told the police that the defendant had been angry with Sam Joseph because Joseph was angry at the couple's son. Malakoff also told the police that on the day of the homicides, the defendant was pacing in their apartment and was calling Joseph a "son of a bitch." (T. 2694, 2697).

On several occasions during her courtroom testimony, Malakoff claimed that her police statement was the product of her simply telling the police whatever they wanted to hear.[9] (T. 2694, 2697, 2699). Malakoff also maintained that the police had threatened to have her children taken away from her if she did not cooperate with them. (T. 2694, 2697-98, 2701, 2704, 2707-08). Finally, Malakoff said that at the time she gave her statement to the police, she hated the defendant and wanted to say whatever it took to hurt him. (T. 2711).

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[9] Malakoff said that at the time of her statement to the police, she was under the influence of prescription drugs given to her by doctors following a recent surgery. (T. 2699-2701).

In her police statement[10], Malakoff told the police that she was awakened on the night of December 4 and was told to get her kids. Malakoff then said that the defendant told her that he shot Joseph when Joseph reached for a gun. Malakoff also said that the defendant had told her that he had made sure that the co-defendant killed Abraham. Malakoff then told the police that she went with the defendant over the 79th Street Causeway and dropped the co-defendant off at a gas station. (T. 2701-08). At trial, Malakoff maintained that she had either not made the foregoing statements or that the statements were lies. (T. 2702-02, 2708).

Malakoff testified that she did not believe that the defendant was involved in the homicides. (T. 2723). Instead, she recalled that the defendant was with her and her children at the Enchanted Forest on the night of December 4. (T. 2723-24). Malakoff said that she had set off fumigation bombs in her apartment that day and it was therefore necessary for her family to remain outside the apartment. (T. 2724). Malakoff stated that her daughter became ill from the insecticide and had to receive medical treatment the following day. (T. 2731-34). Malakoff recalled telling Venturi about the foregoing in December of 1985. (T. 2725).

Luis Rodriguez, the co-defendant, testified that several years before the charged homicides, he left Miami for Orlando because he could not control his drug problem. (T. 2759-60). After arriving in Orlando, he was convicted for aggravated battery on a police officer in 1982. (T. 2748). Two years later, at the time of the homicides, he was

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[10] Malakoff noted that she had spoken with the co-defendant before she provided her statement to the police. (T. 2710).

living with his girlfriend, Carmen Sundin, who was employed as a stripper. (T. 2757).

The co-defendant testified that in December, 1984, he had been laid off from his job and was attempting to earn a living through part-time work. (T. 2761-62). His sister, Maria Malakoff, called him then and invited him to come to Miami to go sailing. During the same conversation, the co-defendant claimed that the defendant got on the phone and told him about a plan he had to make some quick money, which would enable the co-defendant to purchase a house and would enable Sundin to stop stripping. (T. 2763-64). The co-defendant said that he was told that he only needed to act as a lookout. (T. 2764).

The co-defendant flew to Miami on December 4. (T. 2767-70). The co-defendant arrived at the defendant's apartment at 6:30 PM. (T. 2795). At that time, the defendant told the co-defendant that his landlord was to be the robbery victim. (T. 2796). The defendant instructed the co-defendant to tell the Josephs that he had a friend next door holding Maria Malakoff and her children hostage. The co-defendant was also told to demand money and jewelry. (T. 2797, 2799, 2802).

At the Josephs' door, the plan changed. (T. 2803). The defendant handed the co-defendant a gun. (T. 2804). When Mr. Joseph opened his door, the defendant told Mr. Joseph that the co-defendant had a friend who was holding Malakoff hostage. (T. 2806). The defendant then pushed the door open and pushed Mr. Joseph aside. (T. 2806). Once inside the apartment, the defendant ordered Mr. Joseph to sit at the dining room table where Mrs. Joseph was already seated. (T. 2807-08). When Mrs. Joseph complained aloud and reached up for the co-defendant, the co-defendant raised his hand and struck Mrs. Joseph in the mouth with his elbow. (T. 2810, 2863). As the defendant

handed the co-defendant a pair of latex gloves for his use in looking through the apartment, Mr. Joseph offered to retrieve jewelry for the defendant. (T. 2810, 2817-18). Instead, the co-defendant searched through the apartment bedrooms and found money and a gun. (T. 2813-2816). The co-defendant gave the defendant the money he had found and returned the gun that the defendant had originally given him. (T. 2817). When the defendant learned that the co-defendant had found a gun in the bedroom, the defendant became upset with Mr. Joseph. The defendant began a loud and abusive argument with Mr. Joseph that continued after Mrs. Abraham had arrived at the Josephs' apartment. (T. 2818-2827). The defendant then fired one shot at both Mr. Joseph and Mrs. Joseph. (T. 2827-28). The defendant next pointed his weapon in the direction of the co-defendant and Mrs. Abraham and ordered the co-defendant to shoot Mrs. Abraham. (T. 2828-29). Fearful of the defendant, the co-defendant fired the gun he had found at Mrs. Abraham. (T. 2829-31). The co-defendant then handed the defendant the second gun and left the apartment.[11] (T. 2831-32). The co-defendant returned to the defendant's apartment, woke Maria Malakoff and told her to pack the kids into the car. (T. 2833-34). Once the defendant had joined them, the defendant drove to Miami Beach and gave the co-defendant a bag to dump into the water. (T. 2835-37). The co-defendant claimed that he received no proceeds from the crime. (T. 2838).

The co-defendant flew home to Orlando the following day. In the ensuing years, the co-defendant told only Carmen Sundin and Ralph Lopez that he had been

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[11] The co-defendant stated that he heard no shots fired inside the Josephs' apartment after he left the apartment. (T. 2913).

involved in the Abraham homicides. (T. 2840-42).

In August, 1993, the co-defendant provided the police with a sworn statement regarding the homicides. (T. 2774, 2792). The co-defendant conceded that his statement was false in a number of areas. (T. 2793). In his statement, the co-defendant claimed that he had shot Mrs. Abraham through a pillow; at trial, he conceded that the statement was not true. (T. 2793, 2883, 2892-93). In his statement, he told the police that he had shot at two people; at trial, he claimed that he could not recall firing a second shot, although he conceded that he could have also shot Mrs. Joseph in the head. (T. 2859). In his statement, the co-defendant claimed that he and the defendant had ingested cocaine and marijuana before the homicides; at trial, the co-defendant maintained that that was not true. (T. 2906). In his statement, the co-defendant told the officers that the defendant shot the Josephs *after* the co-defendant had shot Mrs. Abraham; at trial, the co-defendant said that he did not mean to say that. (T. 2887-88). Finally, the co-defendant admitted that he never told the police that he had punched Mrs. Joseph in his statement. (T. 2881).

The co-defendant testified that after his arrest, he was able to have the police take him to the homicide section of the police department for visits with his family on at least seven or eight occasions. (T. 2876). On one of those occasions, he was able to have sex with his wife after the police had left him alone with her in an interview room. (T. 2766-77, 2877).

In early 1996, the co-defendant entered into a written plea agreement with the State. (T. 2853, 2935). As originally charged, the co-defendant could have potentially been sentenced to the death penalty three times, or to three life terms with a seventy-five

year minimum mandatory sentence. His plea to reduced charges of second degree murder resulted in a life sentence with a three-year minimum mandatory. (T. 2854, 2868-69). As a condition of his plea, the co-defendant was required to testify truthfully. (T. 2856, 2936).

During the cross examination of the co-defendant, the following exchange occurred between defense counsel and the co-defendant:

> Q: Now, you don't like my client. Is that a fair statement? Or not a fair statement?
>
> A: I dislike him for what he has treated my sister, for the way he has not been a father to his own child. I believe that he could have been better.
>
> Q: So you are telling us you don't like him?
>
> A: I don't particularly care for him, no.
>
> Q: There is a pejorative phrase called hating somebody's guts, okay?
>
> A: True.
>
> Q: A tremendous dislike of somebody. That is how you feel about Tony (the defendant)?
>
> A: No.

(T. 2896-97).

Based upon the foregoing exchange, the State contended that the defense "had opened the door" to admission into evidence of the co-defendant's observation of two prior violent acts of the defendant. (T. 2949). The State contended that the co-defendant's testimony was relevant to demonstrate why the co-defendant feared the defendant and why he disliked him. (T. 2949, 2959-60, 2971-71). The defendant objected, contending

that he had not opened the door to the proffered testimony and that the prejudice to the defendant of the testimony far outweighed its limited probative value. (T. 2949-50, 2961, 2965-66). Although finding that the State's proffered testimony was highly prejudicial, the court ruled that the State would be permitted to elicit the evidence, because defense counsel had asked the co-defendant "why" he disliked the defendant. (T. 2954-55, 2961-62, 2974-76).

The co-defendant then testified that the defendant had previously blackmailed Malakoff for money. (T. 2977). In addition, the co-defendant stated that he had been present at two incidents when the defendant had acted violently. (T. 2977). On one occasion, the defendant had heard a man make an inappropriate remark to a woman. The defendant responded by striking the man in the face with a stone. (T. 2978-79). On the second occasion, the defendant responded to another man's inappropriate remarks to Malakoff by beating the man with a tire iron. (T. 2979-80). The co-defendant stated that he did not call the police on either occasion because he was afraid of the defendant. (T. 2980).

Rafael Lopez testified that sometime in late 1984 or early 1985, the co-defendant told him that he and the defendant had robbed and killed two women and a man in the Abraham case. (T. 3018-21). Lopez did not notify the police about the co-defendant's statement until 1992. (T. 3021). Lopez expected to receive the $50,000 reward that had been posted for the case, but the police denied his claim. (T. 3025-26). At the time of his testimony, Lopez was serving a five year jail sentence. (T. 3024).

At the inception of Detective Ramesh Nyberg's testimony, the court instructed

the jury that his testimony regarding Malakoff's prior police statement was being admitted for impeachment purposes only, and not as substantive evidence. (T. 3050). Nyberg testified that no threats were made against Malakoff to get her to give a sworn statement. (T. 3047-48). Nyberg related that Malakoff told him: that the defendant was upset with Sam Joseph on December 4, 1984; that she heard a loud noise like a gunshot; that the defendant entered the apartment and yelled for her to get the kids; that the defendant had argued with Joseph and that Joseph had pulled a gun; that the defendant had shot Bea and Sam and made sure that they were dead; that the defendant made the co-defendant shoot Abraham and that they had left no witnesses; and that she and the defendant had gone to her mother's trailer looking for property. (T. 3053-58).

Nyberg concluded by noting that Malakoff had had a conversation with the co-defendant before giving her sworn statement to the police. (T. 3065).

Metro-Dade Detective Greg Smith testified that based upon the information received from Rafael Lopez, he and Crawford traveled to Orlando and obtained a sworn statement from the co-defendant. (T. 3074-77, 3092-98). Based upon the information provided by the co-defendant, Smith obtained an arrest warrant and arrested the defendant. (T. 3108-09).

At the police station, Smith advised the defendant of his *Miranda* rights. At that time, the defendant advised Smith that he had taken Trilafon and Benadryl that morning. The defendant advised Smith that the medication made him nervous and restless. Smith was satisfied that the defendant understood his rights. (T. 3013-20).

At the start of their conversation, the defendant told Smith that he was not

involved with the crime; instead, the defendant claimed that he had been in Homestead stealing fruit. (T. 3124, 3130). The defendant stated that when he returned to his apartment, he and his wife set off "bug bombs" and left their apartment. The defendant stated that they then went to his mother's apartment and to Miami Children's Hospital. (T. 3131-32). The defendant also mentioned that some doctors who had purchased his apartment building had been involved in a conspiracy to murder the Josephs. (T. 3133). When Smith told the defendant that the co-defendant had given a full confession to the murders, the defendant changed his story and admitted that his previous stories were lies. (T. 3134-36). The defendant maintained, however, that he did not shoot anyone. (T. 3137).

The defendant then told Smith that the co-defendant came to Miami on the day of the murders in need of money. The defendant suggested that his landlords had money, but added that he could not be involved because his landlords knew him. (T. 3139-40). The co-defendant then asked the defendant to help him get inside the Josephs' apartment. (T. 3140-41). As the defendant and the co-defendant walked to the Josephs' apartment, Isidoro drove up and joined them. The defendant then knocked on the Josephs' door. When Mr. Joseph opened it, the co-defendant and Isidoro forced their way in. The defendant remained outside the apartment. Within seconds, the defendant heard shots. After several minutes, Isidoro and the co-defendant came out of the apartment. The defendant roused everyone in his apartment and the defendant, Malakoff and the co-defendant drove off. At some later point, the co-defendant threw several objects into the water. (T. 3141-45).

At the conclusion of Detective Smith's testimony, the State rested. (T. 3207). In conjunction with its announcement that it was also resting, the defense moved for dismissal of all charges and renewed all previous objections. (T. 3215, 3217). The court denied the defendant's motion. (T. 3219).

During the State's closing argument, the prosecutor argued:

> "Defense counsel has suggested that there were things left out or misstated in the prosecutor's opening, and as I said, lawyers are lawyers. We try to say things correctly, but if they don't come out correctly, we are not the witnesses on the witness stand. Those are the people you have to rely on in making your decision. But somebody obviously was in that apartment with Luis Rodriguez. And we still haven't heard in any of the arguments, in any of the discussions, what the theory is of who that second person could have been."

(T. 3305). Based upon the prosecutor's remarks, the defendant objected and moved for a mistrial, contending that the prosecutor had commented on the defendant's silence at trial. (T. 3305, 3311). The trial court sustained the objection, but denied the defendant's mistrial motion. (T. 3311).

Subsequently, the prosecutor argued:

> "Counsel asked you during voir dire -- by that I mean the jury questioning portion -- counsel asked you, "Would you be willing to listen to two sides, to both sides of the story?" Those were the questions you were asked."
> "This is not a story. This is real life. This is not a fictional tale. And there was nothing in the direct or cross examination of any witness who testified that pointed to any other person being involved other than Luis Rodriguez and this defendant. There were no two sides."

(T. 3315-16). The defense objected to the prosecutor's comment. The court overruled the objection. (T. 3316).

At the conclusion of its deliberations, the jury returned guilty verdicts on all counts, as charged. (R. 867-870, T. 3506-07). The court entered a judgment of conviction on all counts and ordered a pre-sentence investigation. (R. 872-75, T. 3511).

The penalty phase was convened before Judge Rothenberg on December 9, 1996. (R. 991-93).

The State elicited testimony from Detectives Ronald Ilhardt, Jose Castiello, Jeffrey Lewis, James Koenlein, William Kean and Gerard Starkey regarding several armed robberies committed by the defendant. Their testimony demonstrated that on May 15, 1977, the defendant robbed the cashier at the Dupont Plaza; on June 3, 1977, the defendant robbed the Zagami Market; on July 8, 1982, using the name Antonio Chait, the defendant was arrested before he could rob a convenience store; on November 22, 1985, the defendant robbed some people in the parking lot of a Ramada Inn; on February 20, 1988, the defendant robbed a Burger King; on March 17, 1988, the defendant robbed a McDonald's; on April 30, 1988, the defendant robbed a Burger King; on September 14, 1988, the defendant robbed Luna Beds; on October 5, 1988, the defendant robbed Indoor Gardens Florist; on November 11, 1988, the defendant robbed the Fantasy Travel Agency; on November 14, 1988, the defendant robbed a Clothestime store; on January 3, 1989, the defendant robbed a Burger King; on January 11, 1989, the defendant robbed a Fabric King; and, on January 19, 1989, the defendant robbed a Burger King. (T. 3534-43, 3546-65, 3567-80, 3582-3604, 3981-86, 3088-94).

Following his arrest on January 19, 1989, the defendant waived his *Miranda* rights and admitted to Detective Starkey that he had done the Burger King robberies as

well as the robbery of McDonalds. (T. 3584-86, 3589, 3592, 3599). In his statement, the defendant told Starkey that he had done something very bad and that someone had been hurt. The defendant, however, would not elaborate further. (T. 3604-05).

Denise Felix, an officer with the Department of Corrections, testified that the defendant had been placed on parole on February 17, 1981, for a 1977 robbery. (R. 1210-12, T. 3607-11). Subsequently, a warrant was issued for the defendant's arrest because of an alleged parole violation, which had resulted from the defendant's failure to report and his failure to pay the costs of supervision. (R. 1213-14, T. 3611). The defendant was not arrested on the parole warrant until July, 1985. (T. 3613). As a result, the defendant's parole arrest warrant was outstanding on the date of the homicides. (R. 1215-17, T. 3613). In November, 1985, no probable cause was found for the alleged violation and the defendant was released from parole. (T. 3616).

Dr. Rosalind Pass, a clinical psychologist, was appointed by court order on July 18, 1977, to examine the defendant with reference to the prosecution of the defendant in a criminal case. (T. 3628-3631). As part of her examination of the defendant, Dr. Pass administered the Bender-Gestalt test, a Rorshach test, a Minnesota Multiphasic Personality Inventory and a Competency Screening Test. (T. 3634-36). Dr. Pass noted that the defendant had reported hallucinations and that he had an extensive history of drug use involving LSD, heroin, Quaaludes and Tuinals. (T. 3637-38). On July 21, 1977, Dr. Pass found that the defendant suffered from a major mental disturbance: either paranoid schizophrenia or chronic undifferentiated schizophrenia. (T. 3639).

During Dr. Pass' testimony, defense counsel sought to elicit Dr. Pass' opinion

about whether the defendant knew right from wrong. (T. 3641). The State objected to the question. Although the defense argued that the doctor's opinion would be relevant to the severity of the defendant's illness, the court sustained the State's objection and precluded the doctor from expressing her opinion on the matter. (T. 3641-42).

Dr. Pass did state that the defendant did not have an understanding of the events around him and did not understand the consequences of his acts. (T. 3642-43). In her view, the defendant required immediate hospitalization and medication.[12] (T. 3644).

On cross examination, the doctor stated that she did not know the defendant's state of mind on the date of the homicides. (T. 3646).

Dr. David Rothenberg, a clinical psychologist, testified that he examined the defendant pursuant to court order on February 21, 1989, March 21, 1990, September 17, 1990 and February 5, 1991. (T. 3664-66).

On February 21, 1989, Dr. Rothenberg found that the defendant was suffering from a major mental disorder caused by prolonged hallucinogenic abuse. (T. 3667-68, 3670). The defendant had a history of LSD, Valium and Tylenol #3 abuse. (T. 3668). During his examination, the doctor noticed that the defendant was red-faced, perspiring and suffering from tremors and shaking. The doctor felt that the defendant was decompensating and that hospitalization was needed for the defendant. (T. 3669-71).

On March 21, 1990, the doctor found the defendant to be in a semi-stupor and was completely bereft of knowledge regarding his criminal charges. (T. 3671-72). The

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[12] Dr. Pass believed that the defendant was truthful during her testing and had not been trying to fool her. (T. 3643, 3662).

doctor noted that the defendant had been given Trilafon, a psychotropic medication designed to quiet people with major mental disorders. The doctor found that the defendant was still incompetent and that hospitalization was necessary. (T. 3672-75).

On September 17, 1990, the defendant reported to the doctor that he was suffering from hallucinations and flashbacks. The doctor noted that the physical manifestations of the defendant's behavior were consistent with the defendant's complaints. (T. 3676-78). Noting that the defendant was still being given Trilafon and Elavil, the doctor concluded that the defendant continued to suffer from a major mental disorder caused by drug usage. (T. 3679).

In February, 1991, the doctor found that the defendant had been restored to competency. Testing administered to the defendant reflected that the defendant's ability to relate to reality had been recovered. (T. 3679-83).

Dr. Rothenberg testified that the defendant had likely suffered brain damage from prolonged drug usage. Tests, such as the Bender-Gestalt, reflected behavioral characteristics that were consistent with brain damage. (T. 3703, 3707-08). Dr. Rothenberg stated that brain damage of this type was irreversible. (T. 3708).

Dr. Rothenberg also testified that the detailed confession given to the police by the defendant in January, 1989, was not at all inconsistent with his finding that the defendant suffered from a major mental disorder. Dr. Rothenberg has found that people with major mental illnesses can appear perfectly sane during one period and be completely out of touch during another. (T. 3691-93).

Finally, the doctor testified that while it would be speculation for him to give

an opinion as to the defendant's mental state in December, 1984, he would assume that the defendant's mental illness, first diagnosed in 1977, would have continued through 1989. (T. 3705-07).

Dr. Joan Tarpin, a clinical psychologist, testified that the defendant was hospitalized in her unit from March, 1989 through August, 1989. (T. 3734-36). The defendant was diagnosed as suffering from Psychoactive Substance Hallucinosis, a major mental disorder caused by the defendant's ingestion of drugs. (T. 3739, 3743). The defendant was administered the anti-psychotic medications, Trilafon and Haldol. (T. 3744). The defendant was also given Prolixin to manage the defendant's thought disorder, since he had been found to be suffering from delusional thinking. (T. 3738-39).

During the time the defendant was in her unit, Dr. Tarpin noted that the defendant was either unable or unwilling to work on competency material. Although Dr. Tarpin raised the question of malingering, the doctor never concluded that the defendant had malingered during his time in her unit. (T. 3741-42, 3750). The defendant had a high level of anxiety then, and had engaged in acts such as head banging, that required that he be restrained from harming himself further. (T. 3753).

Although an EEG/CAT scan administered to the defendant had come back "Negative" for brain disfunction, Dr. Tarpin believed that the defendant suffered from a major mental disorder during his time in her unit. (T. 3747, 3754-55). Consistent with the opinion of Dr. Rothenberg, Dr. Tarpin also stated that while it would be speculation for her to give an opinion as to the defendant's mental state in December, 1984, a major mental illness first diagnosed in 1977, could continue through 1989. (T. 3747, 3755).

Gerard Garcia, a clinical psychologist at the South Florida Evaluation and Treatment Center (SFETC), testified that the defendant was admitted to the SFETC in April, 1991 and was discharged in September, 1991. (T. 3758-61). The defendant was admitted with a diagnosis of Chronic Undifferentiated Schizophrenia. That major mental disorder is characterized by bizarre hallucinations and delusions. The defendant was treated with Trilafon and Elavil. (T. 3762-63, 3767-68).

During the defendant's treatment, Garcia had an opportunity to closely observe the defendant. (T. 3775). Garcia saw the defendant experience auditory hallucinations. (T. 3765). Garcia treated the defendant for the hallucinations first, then taught the defendant the necessary information to restore him to competency. (T. 3764).

Although Garcia deemed the defendant to be competent to return to court, he still diagnosed the defendant with a schizo affective disorder, which requires continuous administration of medication. (T. 3762, 3770-73). Dr. Garcia opined that this type of disorder is a lifetime illness. Without medication, the defendant would likely return to a psychotic state. (T. 3770-71, 3773, 3783).

Garcia added that throughout the defendant's stay in his unit, he never saw the defendant make up or exaggerate a psychotic episode. (T. 3775-76). Based upon the defendant's history and his observations, Garcia felt that the defendant's illness was genuine. (T. 3775).

Dr. Paul Jarrett examined the defendant pursuant to court order on November 14, 1980 and May 2, 1981. (T. 3817-22, 3837).

On November 14, 1980, the doctor found the defendant to be grossly

disturbed and suffering from a schizophrenic psychosis. (T. 3823). Although the doctor found clear objective signs of the disorder, the doctor noted several instances of conscious distortion by the defendant, which the doctor believed were conscious efforts by the defendant to impress the doctor. (T. 3824, 3827, 3834-36, 3843-44, 3849).

On May 2, 1981, the doctor found the defendant to be competent. The doctor recommended that the defendant be closely monitored and maintained on anti-psychotic medication for the rest of his life. (T. 3837-40). Without medication, there was a significant chance that the defendant would suffer a relapse into psychosis. (T. 3841).

Anna Fernandez, the defendant's older sister, testified that the defendant was nine years old when he arrived in the United States. (T. 3758-59). Since the defendant's father had died when the defendant was three and his mother was required to work to support the family, the defendant spent most of his younger years alone at home. (T. 3859-61). Soon thereafter, their mother was diagnosed with depression, was placed under psychiatric care and had attempted suicide. (T. 3862, 3864, 3866). In Fernandez' view, their mother's condition had an adverse impact on the defendant. (T. 3877). The defendant had begun to hang out with the wrong people and he ultimately got himself into trouble. (T. 3862, 3872). One of the defendant's arrests aggravated their mother's condition and resulted in another suicide attempt by their mother. (T. 3883).

Mayra Molinet, a younger sister of the defendant, testified that when she was younger, the defendant served as a father figure to her. (T. 3894). While their mother suffered from mental problems, the defendant saw to it that she attended school. (T. 3894). Molinet recalled three occasions where their mother had attempted suicide by drug

overdose or by other means. (T. 3895).

Molinet stated that although their mother did not neglect the defendant, their mother's illness did harm the defendant. The defendant became depressed and soon began using drugs with his two sisters. (T. 3897, 3900-01, 3921). Molinet later recalled seeing the defendant in a mental institution on at least forty occasions. The defendant would sometimes feel fine and then appear to be a "zombie" at other times. (T. 3902-03).

Molinet said that the defendant has been a good brother to her and a good uncle to her children. (T. 3918). Molinet specifically recalled one occasion when the defendant went to California to help her get out of an abusive marital relationship. (T. 3900).

Donald Larned, a psychologist at Tomoka Correctional Institution, testified that after the defendant was removed from general population and placed in confinement for an unknown rule violation, the defendant declared an emergency which, by prison rules, required that Larned see the defendant within an hour. (T. 3995-4002, 4006). Larned spoke with the defendant and discovered that the defendant had merely been upset about his placement in confinement. (T. 4003). The defendant was calm and did not suffer from delusions. (T. 4004-05). For the next several days, the defendant was watched continuously. During that period, the defendant behaved normally and voiced no complaints. (T. 4008-10). In Larned's opinion, the defendant was malingering during that episode. (T. 4012).

Dr. Leonard Haber, a clinical psychologist, examined the defendant at the behest of the court on five different occasions from February, 1989 to March, 1991. (T.

4024, 4042).

On February 17, 1989, the doctor observed the defendant suffering from tremors as the defendant's drug use was discussed with the defendant. (T. 4026-27, 4044). At the time, the defendant had a questionable appreciation of the charges against him and lacked the ability to testify on his own behalf. (T. 4043). The doctor added that had he known that the defendant had given a detailed confession about his crimes to the police in January, he might have thought that the defendant had been lying to him in the examination. (T. 4028-29). Nevertheless, the doctor found that the defendant was incompetent and a candidate for hospitalization. (T. 4044).

On March 29, 1990, the defendant reported visual and auditory hallucinations and paranoid ideation. (T. 4047). Dr. Haber again found that the defendant was incompetent and should be hospitalized. (T. 4030, 4048).

On September 12, 1990, the doctor found that the defendant was in a state of decompensation and required further hospitalization. (T. 4030, 4049).

On January 22, 1991, the doctor diagnosed the defendant as a paranoid schizophrenic. Bender Gestalt testing had revealed that the defendant had no brain disfunction or damage. (T. 4037-38). The doctor found that the defendant's disorder was in remission and found that the defendant was competent, but was still in need of further treatment. (T. 4051-53).

On March 13, 1991, the doctor again found the defendant to be incompetent and in need of hospitalization.

Detective Crawford testified that in September, 1993, he had received some

information that an inmate named Alejandro Lago possessed relevant information about this case. (T. 4064-65). At that point, the defense objected. The defense claimed that during Lago's deposition, it became so apparent that his testimony was absurd that the prosecutor told the defense that Lago would not be used as a witness. (T. 4069). The prosecutor confirmed that he told the defense that he would not be calling Lago as a witness. Instead, he sought to elicit Lago's story through Crawford. Lago had told Crawford that the defendant had told him that he wasn't crazy and that he just used his pills to get high. (T. 4066-67, 4073). The defense responded by stating that once they were told by the prosecutor that Lago would not be used, they did not investigate him. (T. 4074). The defense also objected on the ground that Crawford's testimony was unreliable hearsay, because it was based upon statements made by Lago, a multiple convicted felon of questionable veracity. (T. 4069-70, 4075-76). Although noting that the defense had been placed in a position where they could not rebut Lago's claims, the court overruled the defense objection and permitted Crawford to relate what Lago had told him. (T. 4073, 4375). The defense interposed a continuing objection to Crawford's testimony on the point. (T. 4075-77).

Crawford testified that Lago was a cellmate of the defendant, who had been charged with and convicted of attempted first degree murder. (T. 4076-77). Lago told Crawford that the defendant had said that he only used his medication to get high in jail and to trade to inmates for favors. Lago also said that the defendant knew that he had to act insane. At Crawford's request, Lago produced pills and liquid of the type that had been prescribed for the defendant. (T. 4077-4083).

Dr. Charles Mutter, a psychiatrist, testified that he examined the defendant at the request of the prosecutor in 1977. (T. 4096-99). At that time Dr. Mutter found that the defendant was suffering from drug induced psychosis and was in need of hospitalization. (T. 4100, 4123). When Dr. Mutter saw the defendant again in 1980, the doctor believed that the defendant demonstrated signs of schizophrenia. (T. 4101, 4124).

Dr. Mutter testified that he was now retreating from his earlier findings and that he presently believes that the defendant had been malingering. (T. 4102-4105, 4125). Dr. Mutter stated that his review of the defendant's criminal activities, including the defendant's alleged actions in this case, led him to the view that the defendant was too organized in his planning and thinking to be a schizophrenic. (T. 4107-11, 4117-4123). In Dr. Mutter's opinion, at the time of the offenses charged in this case, the defendant demonstrated no signs of operating under extreme emotional or mental disturbance or of being unable to conform his conduct to the requirements of the law. (T. 4121-22).

At the conclusion of the evidence presented, arguments of counsel and the court's instructions, the jury recommended by a vote of 12-0, that the defendant be sentenced to death for each count of first degree murder before the jury. (R. 1291-92, T. 4323).

On January 31, 1997, the court entered its sentencing order in which it found six aggravating circumstances: 1) Section 921.141(5)(a), the defendant was under a sentence of imprisonment at the time of the offense; 2) Section 921,141(5)(b), the defendant had previously been convicted of a prior violent felony; 3) Section 921.141 (5)(d), the homicide was committed during a felony, with burglary as the underlying felony;

4) Section 921.141(5)(e), the homicide was committed to eliminate witnesses; 5) Section 921.141(5)(f), the homicide was committed for pecuniary gain; and 6) Section 921.141(5)(i), the homicide was committed in a cold, calculated and premeditated (CCP) manner. (R. 1738-60, T. 4372-4406). The court assigned great weight to each of the aggravating circumstances found. (T. 4373, 4390, 4392, 4402, 4403, 4406).

The court found that no statutory mitigating circumstances had been established. (R. 1760-82, T. 4406-4441).

As for non-statutory mitigators, the court found that it had been established that the defendant was and is mentally ill. The court gave that mitigator weight. (T. 4443-44).

The court rejected the defendant's mother's mental illness as a mitigator. (T. 4444-45).

The court found that it had been proven that the defendant had a substantial history of drug abuse. (T. 4446). The court considered the defendant's drug problem as the most likely cause for the defendant's decision to commit crimes. As a result of the defendant's long-term, serious problem, the court found that the defendant suffered from drug psychosis. The court also noted that the defendant had never received treatment for his drug problem. The court found that this mitigating circumstance should be given substantial weight. (T. 4446-47).

The court rejected as a mitigating circumstance the fact that the co-defendant had received a lesser sentence. The court found ample justification in the record for the disparate treatment of the defendant and the co-defendant. (T. 4447-50).

The court gave minimal weight to the mitigators that the defendant had been a good brother, a loving father and a caring son. (T. 4450).

The court concluded that the six aggravating circumstances "clearly and remarkably" outweighed the non-statutory mitigating circumstances she had found. (T. 4452). The court added that even if she had not found the CCP and witness elimination aggravating circumstances to exist, the remaining aggravating circumstances would outweigh the mitigating circumstances. (T. 4452). Based upon that conclusion, the court sentenced the defendant to concurrent death sentences for the three murder convictions, and to life imprisonment for the armed burglary conviction, with the life sentence[13] to run consecutively to the death sentences. (R. 1795-98, T. 4454-55).

On February 27, 1997, a timely notice of appeal was filed. (R. 1829). This appeal follows.

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[13] The life sentence constituted an upward departure from the guidelines. The court justified the departure by noting that the defendant had several unscored felony and capital felony convictions. (R. 1793, T. 4455).

SUMMARY OF ARGUMENT

Guilt/Innocence Phase

The trial court erred in denying defense motions for mistrial, which were predicated upon improper police and prosecutorial comments upon the defendant's exercise of his constitutional right to remain silent. Detective Venturi testified that after he had advised the defendant of his *Miranda* rights and had accused the defendant of a criminal offense, the defendant *"refused to answer my [sic] more of my questions."* During his closing argument, the prosecutor twice made remarks which brought to the jury's attention that the defendant had not taken the stand to rebut the story told by State witness, Luis Rodriguez. The testimony of Detective Venturi and the prosecutor's remarks were "fairly susceptible" to interpretation by the jury that the defendant had exercised his constitutional right to remain silent.

The trial court improperly refused to permit the defendant to exercise a peremptory challenge against a Latin male juror, William Borges. At the request of the court, the defense supplied the court with a valid, ethnically neutral reason; that the juror had previously been arrested for a crime. The record fails to support the trial court's conclusion that the reason given was a pretext to veil a discriminatory purpose. Borges remained on the panel that delivered the verdict in this case.

The trial court improperly permitted the State to exercise a peremptory challenge against an Afro-American female juror, Simone Duval. The reason given by the State to support its peremptory challenge of Duval, that Duval did not adequately understand the questioning during voir dire, was completely unsupported by the record.

Duval consistently provided the court and the parties with responses that were appropriate and focused. Additionally, given the fact that the State's entire questioning of Duval consisted of just three simple background questions, it was incumbent upon the trial court to determine that the State's challenge of Duval was not genuine.

The trial court erred in permitting the State to elicit irrelevant evidence of collateral violent acts of the defendant through the State's re-direct examination of the co-defendant, Luis Rodriguez. On cross-examination, defense counsel asked the co-defendant a leading question concerning whether it was fair to say that he did not like the defendant. The co-defendant responded by noting that he did not like the defendant because of the way the defendant had treated his sister and because of the type of father the defendant had been to his son. Based upon the co-defendant's response, the trial court incorrectly determined that defense counsel had "opened the door" to re-direct testimony of the co-defendant concerning two separate prior violent incidents. The co-defendant told the jury that he had observed the defendant attack a man with a concrete slab and a second man with a tire iron. Neither of these two incidents were relevant to any material issue at trial. Instead, the co-defendant's highly prejudicial testimony only served to demonstrate the defendant's violent criminal propensities. The trial court erroneously denied defense objections and motions for mistrial that were predicated upon the co-defendant's testimony.

Additionally, a police officer testified that it was learned during their investigation that the defendant had a "police ID number." A second police officer incorrectly testified that the defendant had on ten occasions used false names in

connection with the police investigation in this case. Both references communicated to the jury that the defendant had been involved in prior, irrelevant criminal conduct or misconduct, which only prejudiced the defendant's opportunity to receive a fair trial.

Penalty Phase

During the State's rebuttal case, the trial court improperly permitted the State to elicit highly prejudicial double hearsay from Detective Crawford, under circumstances that did not allow the defendant a fair opportunity to rebut the hearsay statements. Prior to trial, the prosecutor informed defense counsel that the State would not be calling an inmate named Lago to testify at trial. Defense counsel relied on the prosecutor's assurance and did not investigate Lago's claims or prepare rebuttal to rebut those claims at trial. Instead, the State was permitted to call Crawford, who testified that he had been informed by Lago, that the defendant had told Lago that he did not need the psychotropic medication that had been prescribed for him and that the defendant was just acting crazy. This damaging evidence severely undermined the defendant's mitigation case, which had been based upon the defendant's major mental illness.

The trial court erred in restricting the defendant's presentation of mitigation evidence when the court refused to permit Dr. Rosalind Pass to testify as to her opinion concerning the defendant's ability to differentiate between right and wrong. Given the relevance of the doctor's opinion on that issue to two statutory mitigating circumstances, the capacity of the defendant to conform his conduct to the requirements of the law and the influence of an extreme mental or emotional disturbance on the defendant, it was error for the court to have deprived the jury of the opportunity to consider this important

mitigating evidence.

The trial court improperly erred in considering and weighing as two separate aggravating circumstances, the "felony murder" and "pecuniary gain" aggravators. Florida law plainly precludes the "doubling" of aggravating circumstances when the aggravators are based on the same aspect of the offense. In this case, the record clearly establishes that pecuniary gain was the motivating factor behind the defendant's commission of the burglary of the Josephs' apartment. Under those circumstances, the trial court's use of the burglary to support its finding of the "felony murder" aggravator, as a separate aggravator from the "pecuniary gain" aggravator, was error.

The trial court erred in finding that the cold, calculated and premeditated aggravating circumstance had been established beyond a reasonable doubt. The law in Florida is clear that for application of the "CCP" aggravator, there must be substantial evidence of a calculated, carefully planned, pre-arranged design to kill. The evidence introduced at trial demonstrated that the defendant had planned only the underlying felonies, a burglary and a robbery. There was no preconceived plan to harm or kill the apartment occupants. During the robbery, in the midst of a heated argument between the defendant and Mr. Joseph, the Josephs and Mrs. Abraham were killed. Under these circumstances, the evidence clearly failed to establish the calculation and heightened premeditation necessary for the application of the "CCP" aggravator. Additionally, the trial court erroneously based its finding of the "CCP" aggravator, upon evidence that had been introduced at trial for impeachment purposes only, and not as substantive evidence.

Finally, the trial court erred in finding that the "avoid arrest" aggravating

circumstance had been established beyond a reasonable doubt. In Florida, to establish the "avoid arrest" aggravator when a law enforcement officer is not involved, the State must elicit strong proof that the defendant's sole or dominant purpose for the capital felony was the elimination of a witness. In this case, the record establishes that the Josephs and Mrs. Abraham were killed in the midst of a heated argument between the defendant and Mr. Joseph, and not for the purpose of eliminating them as witnesses. The fact that the defendant was known to the Josephs is not enough to demonstrate this aggravator. Additionally, the trial court's reliance upon evidence that had been admitted for impeachment purposes only, and not as substantive evidence, was improper.

ARGUMENT

I

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTIONS FOR MISTRIAL WHEN BOTH A STATE WITNESS AND THE PROSECUTOR COMMENTED UPON THE DEFENDANT'S EXERCISE OF HIS RIGHT TO REMAIN SILENT, IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION.

This Court has "adopted a very liberal rule for determining whether a comment constitutes a comment on silence: any comment which is 'fairly susceptible' of being interpreted as a comment on silence will be treated as such." *State v. Diguilio*, 491 So. 2d 1129, 1135 (Fla. 1986); *State v. Kinchen*, 490 So. 2d 21 (Fla. 1985). This is so because "it is clear that comments on silence are high risk errors because there is a

substantial likelihood that meaningful comments will vitiate the right to a fair trial by influencing the jury verdict and that an appellate court, or even the trial court, is likely to find that the comment is harmful under *Chapman*."[14]

In the case at bar, a State witness, William Venturi, and the prosecutor commented upon the defendant's exercise of his constitutional right to remain silent. In each instance, the defendant's right to a fair trial was substantially harmed by the highly prejudicial remarks.

1. Venturi's comment upon the defendant's exercise of post-Miranda silence.

Detective William Venturi testified that he met with the defendant on a few occasions in 1985 to discuss information that the defendant claimed would be helpful to Venturi in his investigation of the Abraham homicides. On November 29, 1985, Venturi told the defendant that the information he had provided was not "worthy." Venturi then accused the defendant of a crime, told the defendant that he thought he was involved in the Abraham homicides and advised the defendant of his *Miranda* rights. (T. 2187-89, 2192). After Venturi related that the defendant had admitted to living in the Josephs' apartment building at the time of the homicides, the following exchange occurred between Venturi and the prosecutor:

> Q: I need you to describe to what ever extent you can, your observations as to what you could see as soon as you said to the defendant that you thought that he was involved and wanted to know if he could tell you what he was involved in?

Venturi responded:

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[14] *Chapman v. California*, 386 U. S. 18 (1967).

A: I just asked him, I said, listen, at this time after various versions are you willing to tell me what really happened in there and what your participation was in the homicide. And at that time the man bowed his head down and he just began to cry. *There was some silence there and again I just felt that at this point I had to continue with my interrogation, but he refused to answer my [sic] more of my questions.*

Q: Was that the end of the interview for all practical purposes?

A: Yes. He was getting sick, so we ended the interview.

Q: When you say sick, did you see him physically become sick or did he tell you he was becoming sick?

A: He was shaking. I don't know if it was from crying or illness. He said he was an epileptic to, or from his medicine, and at that time we terminated the interview.

(T. 2193-94).

The defendant objected to Venturi's comments on the ground that the detective had commented upon the defendant's right to remain silent and moved for a mistrial. (T. 2199). Although the trial court appeared to find that the remark was "fairly susceptible" to interpretation as a comment on silence[15], the court denied the defendant's mistrial motion, because the court believed that Venturi had cured the error by referring to the fact that the defendant was not well during the interview. (T. 2201-02).

A clear review of the foregoing exchange reveals that Detective Venturi's remarks were not just "fairly susceptible" to interpretation as a comment on silence. Instead, the remarks were unmistakably clear in their meaning. Detective Venturi plainly

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[15] The court commented that Venturi's remark was "close enough that it could appear [sic] a comment on his right to remain silent. I don't think it was absolutely a comment on his right to remain silent. *But the way it was phrased, it certainly is open to speculation.*" (T. 2200).

informed the jury that in the face of accusation from a police officer, at a point after he had been advised of his *Miranda* rights, the defendant exercised his constitutional right to remain silent by refusing to answer any more of the officer's questions.

Since there is a substantial risk that the jury might view the defendant's silence in the face of accusation to be evidence of guilt, in situations akin to that present here, the courts of this State have uniformly condemned such comments and have reversed convictions tainted by these remarks in favor of a new trial.

In *Smith v. State*, 492 So. 2d 1063 (Fla. 1986), this Court reversed when a police officer testified that the defendant did not wish to talk to him, after the defendant had been read his *Miranda* rights; in *Thornton v. State*, 491 So. 2d 1144 (Fla. 1986), this Court found that a police officer had impermissibly commented upon the defendant's silence when the officer stated that the defendant "did not answer any questions at the initial time of arrest"; in *Smith v. State*, 681 So. 2d 894 (Fla. 4th DCA 1996), the court reversed based upon police testimony that "[the defendant] was read his *Miranda* warnings and he refused"; in *Thompson v. State*, 634 So. 2d 169 (Fla. 1st DCA 1994), the court reversed based upon police testimony that "I attempted to conduct my booking sheet but [the defendant] refused to give me information I had to get"; in *Fundora v. State*, 634 So. 2d 255 (Fla. 3d DCA 1994), the court reversed based upon police testimony that the defendant had said nothing to the officer following his arrest; in *Hicks v. State*, 590 So. 2d 498 (Fla. 3d DCA 1991), the court reversed based upon police testimony that the defendant made no statements after he had been subdued; in *Graham v. State*, 573 So. 2d 166 (Fla. 3d DCA 1991), the court reversed based upon police testimony that the

defendant had refused to give a statement upon his arrest; in *Carr v. State*, 561 So. 2d 617 (Fla. 5th DCA 1990), the court reversed based upon police testimony that the defendant, in response to police questioning, carried on no dialogue and gave no answer; in *J. D. v. State*, 553 So. 2d 1317 (Fla. 3d DCA 1989), the court reversed based upon police testimony that the defendant had refused to give a statement upon arrest; and, in a case markedly similar to the case at bar, the Fourth District in *Bernier v. State*, 547 So. 2d 306 (Fla. 4th DCA 1989), reversed based upon police testimony that the defendant had chosen not to answer any more questions and had terminated the police interview.

Without question, Venturi's comment that the defendant was silent and then refused to answer any more of his questions[16], constituted a clear reference to the defendant's exercise of his constitutional right to remain silent. Contrary to the trial court's finding, Venturi's uncertainty as to whether the defendant had been simply crying or had become ill, did nothing to undo the damage caused by his remark about the defendant's silence. The net result was still unmistakably clear for the jury. Detective Venturi had called the jury's attention to the fact that the defendant had refused to answer his questions about the Abraham homicides. Venturi's testimony was plainly constitutional error.

2. The prosecutor commented upon the defendant's failure to testify in his closing argument.

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[16] An individual can invoke his right to remain silent "at any time prior to or during questioning." *Miranda v. Arizona*, 384 U. S. 436, 473-74 (1966); *Michigan v. Mosley*, 423 U. S. 96 (1975). Thus, a comment on a defendant's invocation of his right to remain silent after he has answered some questions is constitutional error. *State v. DiGuilio*, *supra*.

During his closing argument, the prosecutor remarked:

> "Defense counsel has suggested that there were things left out or misstated in the prosecutor's opening, and as I said, lawyers are lawyers. We try to say things correctly, but if they don't come out correctly, *we are not the witnesses on the witness stand. Those are the people you have to rely on in making your decision. But somebody obviously was in that apartment with Luis Rodriguez. And we still haven't heard in any of the arguments, in any of the discussions, what the theory is of who that second person could have been."*

(T. 3305). Based upon the prosecutor's remarks, the defendant objected and moved for a mistrial, contending that the prosecutor had commented on the defendant's silence at trial. (T. 3305, 3311). The trial court sustained the objection, but denied the defendant's mistrial motion. (T. 3311).

Subsequently, the prosecutor argued:

> "Counsel asked you during voir dire -- by that I mean the jury questioning portion -- counsel asked you, "Would you be willing to listen to two sides, to both sides of the story?" Those were the questions you were asked."
> "This is not a story. This is real life. This is not a fictional tale. *And there was nothing in the direct or cross examination of any witness who testified that pointed to any other person being involved other than Luis Rodriguez and this defendant. There were no two sides."*

(T. 3315-16). The defense objected to the prosecutor's comment, however, the court overruled the objection. (T. 3316).

In both of the comments quoted above, the prosecutor plainly argued to the jury that they had yet to hear from a witness on the witness stand who could establish the identity of the man who had committed the crimes with Luis Rodriguez. Those remarks, together with the prosecutor's reference that the jury had not heard "two sides" of the story,

were comments that were fairly susceptible to interpretation as references to the defendant's failure to testify.

In *Abreu v. State*, 511 So. 2d 1111 (Fla. 2d DCA 1987), a cooperating State witness, Koonce, testified and implicated the defendant in cocaine trafficking. During closing argument, the prosecutor argued:

> "Now, Ladies and Gentlemen of the jury, you also heard [Koonce] tell you about the facts of this case. That is the relevant evidence. *And what did you hear to rebut that? Who took the stand and said that what he said wasn't true?*

Based upon the prosecutor's remarks, the Second District reversed the defendant's conviction, holding that the prosecutor's comments were fairly susceptible to interpretation that the defendant had failed to rebut Koonce's story. In doing so, the prosecutor improperly focused the jury's attention on the defendant's failure to testify.

Similarly, in *Rigsby v. State*, 639 So. 2d 132 (Fla. 2d DCA 1994), the Second District concluded that the prosecutor had improperly commented on the defendant's right not to testify when he stated, "we have heard [counsel's] version about what happened that night, but we didn't hear that from the stand" and "you didn't hear from the stand from anyone who could testify as to exactly how it happened." See also, *Carr v. State*, *supra*, where a reference to the failure to hear from "both sides" of an incident was found to be a comment on the defendant's right to remain silent.

Just as in *Abreu*, the prosecutor in this case argued to the jury that they had not heard from a witness who could rebut the story told by a cooperating State witness, in this case, Luis Rodriguez. In doing so, the prosecutor focused the jury's attention on the

defendant's failure to come forward, testify and rebut the version provided by Luis Rodriguez. This message was further buttressed by the prosecutor's remark that the jury had not heard "two sides" of the story. On that basis, the prosecutor's comments were clearly improper and prejudicially infringed upon the defendant's exercise of his constitutional right to remain silent.

Although the defendant's exercise of this fundamental right was the subject of State witness and prosecutorial comment on more than one occasion, this Court is still required to determine whether the errors that occurred below were harmless. In doing so, this Court must determine whether there was a reasonable possibility that the prejudicial remarks affected the verdict. *State v. DiGuilio*, *supra* at 1139. The State bears the burden in this Court of proving beyond a reasonable doubt that the error did not affect the verdict. *Id.* On this record, the State cannot meet its burden.

The State's entire case was reliant on the testimony of the cooperating State witness and former co-defendant, Luis Rodriguez. Rodriguez entered into a formal plea bargain with the State in return for his testimony against the defendant. As compensation, Rodriguez received a conviction on reduced charges and certain avoidance of the death penalty. (T. 2853-56, 2868-69, 2935-36). Rodriguez' courtroom testimony was substantially impeached with the formal statement he had previously given to the police. In addition, there was absolutely no physical evidence that tied the defendant to the offenses charged. Based upon the foregoing, it is clear that there was a very real possibility that the highly prejudicial comments of William Venturi and the prosecutor, calling attention to the defendant's exercise of his constitutional right to remain silent, had

affected the jury's verdict below. On that basis, this Court should reverse the defendant's convictions and remand this cause for a new trial. *State v. DiGuilio*, *supra*.

II

THE TRIAL COURT ERRED IN REFUSING TO PERMIT THE DEFENSE TO EXERCISE A PEREMPTORY CHALLENGE AGAINST A HISPANIC JUROR, WHERE THE DEFENSE GAVE AN ETHNICALLY NEUTRAL AND NONPRETEXTUAL REASON FOR THE CHALLENGE, IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION.

In *Melbourne v. State*, 679 So. 2d 759, 764 (Fla. 1996), this Court established the following guidelines to be used whenever a racially or ethnically-based objection to a peremptory challenge is made:

> A party objecting to the other side's use of a peremptory challenge on racial grounds must: a) make a timely objection on that basis, b) show that the venireperson is a member of a distinct racial group, and c) request that the court ask the striking party its reason for the strike. If these initial requirements are met (step 1), the court must ask the proponent of the strike to explain the reason for the strike.
>
> At this point, the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step 2). 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 on 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 racial discrimination.

(Footnotes omitted).

During jury selection in this case, defense counsel attempted to exercise a peremptory challenge against prospective juror, William Borges. (T. 1645). The prosecutor objected to the peremptory, noting for the record that Borges was a Hispanic male. (T. 1645). At the request of the court, the defense justified the peremptory by noting that Borges had been arrested for carrying a concealed firearm and had had the charges dropped against him. Fearing that Borges would feel a debt of gratitude to the State, the defense sought to strike him from the panel.[17] (T. 1285-86, 1645-47).

Pursuant to the guidelines established in *Melbourne*, it was then incumbent upon the trial court to determine if defense counsel's explanation was facially race-neutral, and if neutral, whether the explanation was pretextual.

The trial court determined that the explanation given was both racially motivated and pretextual. Noting that there were other jurors remaining on the panel who had prior arrests and had been "similarly situated" as Borges, the court disallowed the challenge. (T. 1647-48). Borges therefore remained as part of the panel that determined the defendant's guilt and recommended the defendant's sentence.[18]

Since no reasonable reading of the record can support either conclusion

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[17] Defense counsel also expressed concern about Borges' mental abilities, the juror's relatively youthful age and the composition of the jury panel. (T. 1646).

[18] The defendant properly renewed his objections to the court's rulings at the conclusion of jury selection. (T. 1662). The trial court ruled that all objections had been preserved for the record. (T. 1662).

reached by the trial court, the court's decision to maintain Borges on the defendant's jury panel was clearly erroneous and mandates a reversal of the defendant's convictions and sentences.

Initially, it is clear that the defendant's proffered reason for challenging Borges is both supported by the record and race-neutral. As defense counsel had claimed, Borges had informed the court, during the court's initial questioning, that he had been arrested, but not convicted, for carrying a concealed firearm. (T. 1286). The courts of this State have uniformly held that a juror's prior arrest record is a valid race-neutral reason sufficient to justify a peremptory challenge. See, *Davis v. State*, 691 So. 2d 1180 (Fla. 3d DCA 1997); *Martinez v. State*, 664 So. 2d 1034 (Fla. 4th DCA 1995); *Miller v. State*, 605 So. 2d 492 (Fla. 3d DCA 1992) and *Stephens v. State*, 559 So. 2d 687 (Fla. 1st DCA 1990).

Given that the defendant's explanation in support of his challenge of Borges was clearly ethnically neutral on its face, the State then had the burden of proving that the challenge was invalid by demonstrating that the defendant's explanation was not genuine. *Melbourne, supra.* The State contended, and the court agreed, that Borges' arrest record was not a genuine reason, because there were other jurors remaining on the panel who had been previously arrested and had not been challenged by the defense.[19] (T. 1646-48). While the court's finding is superficially true, the totality of the circumstances surrounding

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[19] In *Slappy v. State*, 522 So. 2d 18 (Fla.) *cert. denied*, 487 U. S. 1219 (1988), this Court gave examples of the types of circumstances which should be examined to determine the genuineness of a party's explanation for a strike. Included among the circumstances was a strike based on a reason equally applicable to an unchallenged juror.

the strike plainly reveal that the defendant's challenge of Borges was in no way motivated by ethnic discrimination.

The record reveals that eight prospective jurors, Ortega, Arzuaga, deJesus, McGhee, Keel, Strachan, Chai and Borges, had been previously arrested. (T. 709-10, 730-31, 774-79, 1285-86, 1293-94, 1306-07, 1317-18). Of those, deJesus was stricken for cause by the court, and Ortega, Keel and Chai were stricken for cause at the behest of the State. (T. 786, 857-61, 869, 1343, 1350-1352). Strachan was the subject of a peremptory challenge by the State. (T. 1474).

As such, at the time that the defense sought to strike Borges, only Arzuaga[20] and McGhee[21] remained on the panel. As between Arzuaga and McGhee, only Arzuaga was truly "situated similarly" to Borges. Although McGhee claimed to have been arrested,[22] he later stated that he had only been charged with a traffic offense, which he subsequently took to a bench trial. Arzuaga, however, was a Latin-surnamed male, who, like Borges, had been charged with carrying a concealed firearm and had had the charges disposed of without a conviction. (T. 730-32). Although unstated, the trial judge could only have been referring to Arzuaga, when she found the defendant's strike to be pretextual.

Given that Arzuaga and Borges were apparently Hispanic, by virtue of their surnames, and given that the defendant is likewise Hispanic, it is difficult to conceive of

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[20] Arzuaga went unchallenged and served on the jury.

[21] Neither McGhee's race nor his ethnicity are clear from the record.

[22] McGhee stated that he was not locked up. The police only "took [him] in." (T. 1285).

how the defendant's challenge of Borges could logically be deemed to be an exercise in purposeful discrimination.

The Third District, in *Davis v. State*, *supra*, illustrated this point with clarity. In *Davis*, the State sought to strike juror Pittman, an African-American juror, and explained, when requested to by the court, that the strike was based upon the juror's arrest record. The trial court permitted the challenge. On appeal, the defendant complained that the State's explanation was pretextual, since three jurors remaining on the panel had also had arrest records. The Third District rejected the defendant's claim, noting:

> It is true that disparate treatment of similarly situated jurors can give rise to a finding of pretext. The record, however, must show that the disparate treatment of the jurors in question is based on racial grounds. For example, where the state accepts three white jurors who have been previously arrested, and then strikes an African-American juror who shares this same characteristic, it would be difficult to accept as a valid race-neutral reason that the juror in question is being stricken because he or she has been previously arrested. Such a situation could reasonably give rise to a finding of pretext in the absence of an explanation as to why white jurors with exactly the same experience would be acceptable. This is the situation the defendant suggests existed in this case. Unfortunately, the record does not identify the race of jurors Carlisle, Rodriguez or Dickson. It is therefore impossible for us to determine the question of pretext. *If these three jurors are African-Americans, as is Ms. Pittman, then there would be no reason to believe that Pittman was excused for racial reasons.* There is nothing in *Neil,*[23] or its progeny, that forbids choosing among available jurors, even for capricious reasons, so long as the reasons are not racially discriminatory. Peremptory challenges are still presumed to be exercised in a non-discriminatory manner.

(Citations omitted). *Davis*, 691 So. 2d at 1181-82.

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[23] *State v. Neil*, 457 So. 2d 481 (Fla. 1984).

Since the record reflects that Borges and Arzuaga share the same characteristic that was the basis for the challenge of Borges, and since both jurors apparently shared the same Hispanic heritage, it is clear that there is simply no basis to conclude that the challenge of Borges was motivated by discrimination against Hispanics. *Davis v. State*, *supra*. As noted by the Third District, nothing in Florida law should have precluded the defendant from choosing among Arzuaga and Borges, as long as the defendant's choice was not based upon a discriminatory reason. Since the record is devoid of any evidentiary support for the notion that the defendant's challenge was anything but a legitimate exercise of a defendant's right to take part in the selection of an impartial jury, it was error for the trial court to disallow the defendant's peremptory challenge of Borges based on the defendant's purported pretextual effort to engage in ethnic discrimination. As a result, since the defendant's jury was selected in a manner that was inconsistent with the requirements of Article I, Section 16, of the Florida Constitution and the Fourteenth Amendment to the United States Constitution, the defendant's convictions and sentences must be reversed.

III

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO EXERCISE A PEREMPTORY CHALLENGE AGAINST AN AFRICAN-AMERICAN JUROR, WHERE THE STATE FAILED TO GIVE A RACIALLY NEUTRAL AND NONPREXTUAL REASON FOR THE CHALLENGE, IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA

CONSTITUTION.

During the jury selection process, the State sought to exercise a peremptory challenge against Simone Duval. (T. 1656). The defense objected to the challenge, noting that Duval was an African-American female. (T. 1656). At the request of the court, the State sought to justify its peremptory by explaining that its challenge was based upon Duval's apparent lack of understanding or confusion regarding the questions asked. (T. 1656-58). The defense objected, noting that Duval had answered all questions appropriately, albeit in a quiet voice. (T. 1658). The court permitted the challenge, noting that although Duval had been asked few questions, she seemed to have difficulty understanding the questions asked of her and in being understood by the court. (T. 1658-59).

Based upon the standards enunciated in *Melbourne*, *infra*, and a review of the record, it is clear that the State's explanation for striking Duval was both unsupported by the record and pretextual in nature. It was therefore error for the trial court to have permitted the State's peremptory challenge of juror Duval.

Before attempting to exercise both a cause challenge and a peremptory challenge against Duval, the State asked Duval only three questions. Those questions concerned her occupation (a cook), the location of her job (Miami Beach) and her marital status (divorced). (T. 1426). Nevertheless, the State attempted to have juror Duval challenged for cause, based upon the State's perception that Duval could not return a guilty verdict if the verdict was based upon the testimony of a co-defendant turned

cooperating State witness.[24] (T. 1653). The defense and the court informed the prosecutor that their notes from the questioning did not reflect that Duval would have difficulty relying on the testimony of a co-defendant under the circumstances described by the prosecutor. (T. 1653). The court then recalled Duval. Under questioning by the court and the prosecutor, Duval re-affirmed that she could rely on the testimony of a cooperating co-defendant in finding the defendant guilty. (T. 1655). The court then denied the State's cause challenge. (T. 1656). The State then successfully exercised its peremptory challenge against Duval.

It is important to note that each of the answers that Duval gave to the questions asked of her at that point were appropriate and responsive to the question asked. (T. 1653-56). Duval had been previously asked questions by the court and the defense about her background, her prior jury experience, the presumption of innocence, her ability to reserve judgment until all of the evidence had been received, her ability to be fair, her ex-husband's occupation, and her ability to accept the testimony of a cooperating co-defendant. (T. 1311, 1617-19, 1628). Throughout, Duval's answers demonstrated an explicit understanding of the question asked, the subject matter covered by the question and her ability to communicate. When defense counsel noted that Duval spoke with an accent, Duval assured him that she had no difficulty understanding everything that had been said.[25] (T. 1619). There is simply nothing in this record to support the notion that

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[24] The State's mis-perception was based upon answers Duval gave in response to questions asked by defense counsel. (T. 1617-19).

[25] The trial court partially relied upon the exchange between defense counsel and Duval for her ruling that Duval lacked the ability to sufficiently understand the

Duval lacked the capacity to sufficiently understand the proceedings before her.

Several cases demonstrate the inadequacy of the State's explanation.

In *Givens v. State*, 619 So. 2d 500 (Fla. 1st DCA 1993), the trial court accepted the State's challenge of a black juror that the State had justified by noting that the juror had trouble reading the juror form and had trouble paying attention. The First District reversed, finding no record support for the challenge since the juror had provided adequate verbal responses to the questions addressed to her. In *Brown v. State*, 597 So. 2d 369 (Fla. 3d DCA 1992), the Third District reversed the defendant's conviction after finding no record support to substantiate a State strike of a juror that had been based upon the juror's lack of understanding and an inability to hear. In *Bullock v. State*, 670 So. 2d 1171 (Fla. 3d DCA 1996), the Third District reversed the defendant's conviction after finding no record support to substantiate a State strike of a juror that had been based upon the juror's reluctance and non-responsiveness to questioning. See also, *Spencer v. State*, 615 So. 2d 688 (Fla. 1993), where this Court found error in a trial judge's arbitrary excusal of a black juror based upon the juror's IQ and confusion.

Since the State's proffered explanation was clearly not supported by the record, it should not have been accepted by the trial court. Despite the lack of record support for the State's explanation, it should also have been apparent to the court that the State's explanation was not genuine. As noted earlier, the State asked just three questions of Duval before the selection process had begun. All three questions concerned basic background information. (T. 1426). More interestingly, the State asked Duval

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proceedings. (T. 1658).

nothing about her ability to understand the questions posed or the proceedings to be conducted. This apparent lack of interest in Duval belies the explanation given by the State to justify its peremptory challenge.[26]

While a trial court is vested with discretion in its assessment of the legality of a party's peremptory challenge of a minority juror, that discretion may be said to be soundly exercised only when the court's decision is supported by the record. *Melbourne, supra*; *Nunez v. State*, 664 So. 2d 1109, 1112 (Fla. 3d DCA 1995). In this case, the trial court abused its discretion in permitting the State to challenge juror Duval, when the record completely failed to support the State's justification for that challenge. A reversal of the defendant's convictions and sentences is therefore required.

IV

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO ELICIT IRRELEVANT AND HIGHLY PREJUDICIAL EVIDENCE OF THE DEFENDANT'S INVOLVEMENT IN COLLATERAL CRIMINAL ACTIVITY, THEREBY DEPRIVING THE DEFENDANT OF HIS RIGHT TO A FAIR TRIAL GUARANTEED TO HIM BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

It is the established law of this State, that evidence of any crime committed by a defendant, other than the crime or crimes for which the defendant is on trial, is

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[26] In *Slappy v. State*, *supra* at 23, n. 3, this Court noted that a party's failure to question a juror is one indication that a reason given by the non-questioning party for striking the juror is not well-established.

inadmissible in a criminal case, where its sole relevance is to attack the character of the defendant or to show the defendant's propensity to commit crime. *Holland v. State*, 636 So. 2d 1289 (Fla. 1994); *Craig v. State*, 510 So. 2d 857 (Fla. 1987); *Williams v. State*, 110 So. 2d 654 (Fla.) *cert. denied*, 361 U. S. 847 (1959). This is so, because a verdict of guilty on a criminal charge should only be based upon evidence pertaining specifically to the crime charged. "The jury's attention should always be focused on guilt or innocence of the crime charged and should not be diverted by information about unrelated matters." *Craig v. State*, *supra* at 863.

These well-established principles have been codified in the Florida Evidence Code at Sections 90.401-90.404, Florida Statutes. Section 90.401 provides that relevant evidence is evidence that tends to prove or disprove a material fact. Section 90.402 provides for the admissibility of relevant evidence, except as provided by law. Section 90.403 provides, in pertinent part, that relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice. Section 90.404(2) permits the introduction of similar fact evidence of other crimes, when the evidence is relevant to prove a material fact in issue. Taken in *pari materia*, it is apparent from Florida's statutory scheme, that evidence of collateral criminal activity is admissible *only* if relevant to prove a material fact in issue and if its probative value is not outweighed by unfair prejudice. See, *Craig v. State*, *supra* and *Straight v. State*, 397 So. 2d 903 (Fla. 1981).

The trial court violated these fundamental precepts, when the court permitted the State to elicit highly prejudicial evidence of collateral criminal activity by the defendant,

which was not relevant to any material fact in issue. It was error for the court to overrule defense objections and to deny defense mistrial motions based upon the admission of the improper evidence.

1. Luis Rodriguez' testimony concerning two acts of violence by the defendant.

During the defense cross examination of Luis Rodriguez, defense counsel explored Rodriguez' possible bias against the defendant by engaging in the following exchange with Luis Rodriguez:

> Q: Now, you don't like my client. Is that a fair statement? Or not a fair statement?
>
> A: I dislike him for what he has treated my sister, for the way he has not been a father to his own child. I believe that he could have been better.
>
> Q: So you are telling us you don't like him?
>
> A: I don't particularly care for him, no.
>
> Q: There is a pejorative phrase called hating somebody's guts, okay?
>
> A: True.
>
> Q: A tremendous dislike of somebody. That is how you feel about Tony (the defendant)?
>
> A: No.

(T. 2896-97).

Based upon the foregoing, the State contended that the defense "had opened the door" to the admission of evidence concerning the defendant's previous violent acts, arrests and incarceration. (T. 2949-52). The defense objected, claiming that they had

not opened the door to the admission of the evidence, that the proposed evidence offered by the State was not relevant and that any limited probative value that the evidence had was far outweighed by the prejudice to be suffered by the defendant, if the evidence was to be admitted. (T. 2949, 2952-54, 2961). The court indicated that the defense had been entitled to inquire about the witness' bias against the defendant, but expressed concern that the defense had opened the door by asking the witness "why" he disliked the defendant. (T. 2954-55). The court then had the State proffer the co-defendant's testimony that the State intended to introduce.

The co-defendant then testified that he had witnessed the defendant engage in two incidents of random violence that had previously given the co-defendant reason to fear the defendant. The co-defendant summed up his recitation of these incidents by noting, "Again, that was something that happened spontaneously and I just -- I was a spectator to that -- both occasions. I have reasons why, at least back then I had reasons why I -- I feared this man. Today, I don't fear him, but back then I did." (T. 2959-60).

The court recognized that the co-defendant's testimony was highly prejudicial to the defendant. However, based upon the fact that the defense had asked the co-defendant "why" he disliked the defendant, the court ruled that the witness could expand upon the answer that he had given previously.[27] (T. 2961-62, 2967). Additionally, while correctly recognizing that the defense had not questioned the co-defendant regarding his fear of the defendant, the court ruled that the State could elicit the co-defendant's

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[27] The defense noted that the witness' answer to the question was fairly complete. (T. 2967). Any further expansion of the answer would unnecessarily inject prejudicial evidence into the trial. (T. 2967-68).

testimony regarding the violent acts he had observed the defendant commit. (T. 2968-71, 2974).

Pursuant to the court's ruling, the co-defendant testified that the defendant had previously blackmailed Malakoff for money. (T. 2977). In addition, the co-defendant stated that he had been present at two incidents when the defendant had acted violently. (T. 2977). On one occasion, the defendant had heard a man make an inappropriate remark to a woman. The defendant responded by striking the man in the face with a stone. (T. 2978-79). On the second occasion, the defendant responded to another man's inappropriate remarks to Malakoff by beating the man with a tire iron. (T. 2979-80). The co-defendant stated that he did not call the police on either occasion because he was afraid of the defendant. (T. 2980).

The trial court's ruling admitting the highly prejudicial testimony of the defendant's two prior random acts of violence was based upon at least one faulty premise. It is clear that the court was under the mistaken impression that the defense had asked the co-defendant "why" he disliked the co-defendant. In fact, the defense did not ask the witness such an open-ended question. Instead, the witness took the opportunity to volunteer reasons why he did not like the defendant, in response to a leading question concerning whether it was a "fair statement" that he disliked the defendant. (T. 2896). The answer Rodriguez offered was complete; it concerned the defendant's treatment of the co-defendant's sister and the defendant's shortcomings as a father. The witness did not include in his reasons the fact that he had observed the defendant engage in prior violent acts. (T. 2896-97). As such, in no way did the defendant "open the door" to admission of

evidence regarding the prior violent acts. See, *State v. Baird*, 572 So. 2d 904 (Fla. 1990) *Hitchcock v. State*, 673 So. 2d 859 (Fla. 1996) and *Walker v. State*, 642 So. 2d 605 (Fla. 1st DCA 1994).

Relatedly, the court also erroneously justified its admission of Rodriguez' testimony concerning the prior violent incidents on the ground that it demonstrated a basis for Rodriguez' dislike of the defendant. (T. 2974). The record simply does not support the trial court's conclusion. For not only did Rodriguez not initially mention the two prior incidents as a basis for his "dislike" of the defendant, but he plainly indicated, when given an opportunity to explain, that the violent incidents gave him reason to fear the defendant at one time, not to dislike him. (T. 2959-60). The co-defendant's fear of the defendant, however, was in no way relevant to any material issue of fact being tried before the court.[28]

The State's theory of prosecution was that the defendant and the co-defendant had acted in concert when committing the burglary and murders charged. On that basis, the co-defendant's subjective fear of the defendant, especially in light of his plea agreement with the State, was simply not relevant to any issue concerning the defendant's guilt of the crimes charged. Instead, the violent acts attested to by the co-defendant were only useful in convincing the jury that the defendant had a criminal propensity to commit random acts of violence; an evidentiary purpose specifically prohibited under Florida law. Section 90.401-04, Florida Statutes; *Holland v. State*, *supra*.

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[28] The State conceded that the co-defendant's fear was irrelevant during its closing argument to the jury. (T. 3337). Nevertheless, the irrelevant nature of the co-defendant's fear and of the evidence of the two violent acts, did not keep the State from mentioning the incidents twice during its closing argument, thereby exacerbating the prejudice to the defendant. (T. 3333-37).

Even if this Court should find that the record supports the notion that Rodriguez had testified that his observation of these violent acts gave him a basis for disliking the defendant, the extreme prejudice resulting from the description of these alleged acts of wanton violence far outweighed the limited probative value of the evidence. On that basis, the court should have excluded the evidence, as contended by the defense, under Section 90.403, Florida Statutes. See, generally, *Henry v. State*, 574 So. 2d 73 (Fla. 1991) and *Thomas v. State*, 599 So. 2d 158 (Fla. 1st DCA 1992).

2. Detective Venturi's reference to the fact that the defendant had a police ID number and Detective Crawford's erroneous reference to the defendant's alleged use of ten false names.

Detective Venturi, the first lead detective to investigate the Abraham homicides, testified that in 1985, he met a man named Antonio Chait, who provided the detective with some information about the homicides. (T. 2177-78). In the course of fleshing out Chait's information, Detective Venturi stated that he learned from Detective Crawford that Chait was really the defendant and that the defendant had a police ID number. (T. 2179).

Later, Detective Crawford was asked by the prosecutor how many other names the defendant had used in contacts with the police regarding the investigation in this case. Crawford erroneously stated "ten." (T. 2225-26).

The defendant objected and moved for a mistrial in both instances. Each time, the defendant contended that the detective had made a remark that implied that the defendant had a prior record or had been involved in other acts of misconduct. (T. 2199, 2226-27). The court overruled the defendant's objections and denied his mistrial motions.

(T. 2201-02, 2229).

In *Roman v. State*, 475 So. 2d 1228 (Fla. 1985), this Court was presented with a police reference that was markedly similar to the reference made by Detective Venturi. In *Roman*, the following exchange transpired between the prosecutor and a police officer:

> Q: In the course of the investigation, once you focused upon the Defendant, Ernest Roman, as the person who had committed these crimes, *did you have occasion to look at his records in the Sumter County Sheriff's Department?*
>
> A: Yes, I did.

This Court found that the question was improper, since its sole relevance was to show the defendant's criminal history.

Similarly, the Second District in *Rimes v. State*, 645 So. 2d 1080 (Fla. 2d DCA 1994), held that a police officer's reference to the fact that he had obtained the defendant's photograph from the "vice and narcotics file" was improper, since it suggested that the defendant had been involved in other criminal activity. See also *Perkins v. State*, 349 So. 2d 776 (Fla. 2d DCA 1977) and *Whitehead v. State*, 279 So. 2d 99 (Fla. 2d DCA 1973), holding that a reference to the fact that the defendant's photograph was a "mug shot" was an improper reference to the defendant's prior criminal activity.

Detective Venturi's reference to the fact that the defendant had a police ID number, clearly and improperly communicated to the jury that the defendant had had prior involvement with the police regarding criminal activity. The State's contention that such a conclusion would require a "leap of faith" by the jury, simply does not square with

common sense and a reasonable juror's experience. (T. 2199). While a person who innocently requests police assistance (example: car accident) might expect to have his situation be given a police case number, it is unlikely that a reasonable person would expect that he would also be individually assigned an identification number by the police. Instead, the more reasonable assumption for the jury to draw, when informed that the defendant had been assigned a police ID number, would be that the defendant had previously been involved in criminal activity.

The prejudice from Detective Venturi's improper reference regarding the defendant's police ID number, was buttressed by Detective Crawford's erroneous statement that the defendant had used ten false names in his contacts with the police during the investigation of this case. While Crawford's statement might have been relevant, if true, its false content served to prejudice the defendant.[29] The only inference that the jury could have drawn from this erroneous statement was that the defendant had taken great steps to conceal his identity, in a likely effort to conceal his criminal involvement in the Abraham homicides.

The admission of Detective Crawford's statement, as well as the other references described above, is presumed to be harmful error, because of the danger that a jury will take the bad character or propensity to commit crime or acts of misconduct thus demonstrated, as evidence of guilt of the crime charged. *Holland v. State*, *supra*; *Craig v. State*, *supra*. Collateral criminal evidence is particularly harmful when it demonstrates that

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[29] The defendant concedes that the prejudice suffered by him as a result of Crawford's false statement is somewhat diminished since the record does reflect that the defendant used two false names in his dealings with the police. (T. 2179, 2182-83).

the defendant has committed a similar crime, or one equally heinous, since the collateral evidence will frequently prompt a more ready belief by the jury that the defendant might have committed the crime charged. *Craig v. State*, *supra*; *Nickels v. State*, 90 Fla. 659, 106 So. 479 (1925).

In this case, the defendant was on trial for his life on a charge of first degree murder. The defendant was denied the opportunity to have the jury fairly determine his guilt of the crimes charged, when the State improperly informed the jury that the defendant had previously engaged in two irrelevant acts of wanton and random violence, that the defendant had a police ID number and that the defendant had used ten false names in his contacts with police regarding this case. The prejudice suffered by the defendant as the result of the trial court's rulings on these matters, served to deprive the defendant of his constitutional right to a fair trial. A reversal of the defendant's convictions and sentences and a remand for a new trial is required.

V

THE TRIAL COURT ERRED IN PERMITTING DETECTIVE CRAWFORD TO TESTIFY TO HIGHLY PREJUDICIAL DOUBLE HEARSAY DURING THE PENALTY PHASE, WHEN THE DEFENDANT DID NOT HAVE THE OPPORTUNITY TO EFFECTIVELY REBUT THE HEARSAY TESTIMONY, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 6 AND 9, OF THE FLORIDA CONSTITUTION.

In *Engle v. State*, 438 So. 2d 803, 813, this Court stated:

> The requirements of due process of law apply to all three phases of a capital case in the trial court: 1) The trial in which the guilt or innocence of the defendant is determined; 2) the penalty phase before the jury; and 3) the final sentencing process by the judge. *Presnell v. Georgia,* 439 U. S. 14, 99 S. Ct. 235 (1978); *Gardner v. Florida*, 430 U. S. 349, 97 S. Ct. 1197 (1977); *Green v. Georgia*, 42 U. S. 95, 99 S. Ct. 2150 (1979). Although defendant has no substantive right to a particular sentence within the range authorized by statute, sentencing is a critical stage of the criminal proceeding.
>
> The sixth amendment right of an accused to confront the witnesses against him is a fundamental right which is made obligatory on the states by the due process of law clause of the fourteenth amendment to the United States Constitution. *Pointer v. Texas*, 380 U. S. 400, 85 S. Ct. 1065 (1965). The primary interest secured by, and the major reason underlying the confrontation clause, is the right of cross-examination. *Pointer v. Texas*. This right of cross-examination is a right that has been applied to the sentencing process. *Specht v. Patterson*, 386 U. S. 605, 87 S. Ct. 1209 (1967).

Perhaps in recognition of the fundamental rights discussed in *Engle*, the Florida Legislature enacted Section 921.142 (2), Florida Statutes, which governs the reception of evidence at a penalty proceeding in a capital case. That provision states in pertinent part:

> In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, *provided the defendant is accorded a fair opportunity to rebut any hearsay statements.*

In the instant case, the provisions of Section 921.142 (2), as well as the Sixth and the Fourteenth Amendments were violated, when the trial court permitted the State to

elicit double hearsay from Detective Crawford during the penalty phase, under circumstances in which the defendant did not have a fair opportunity to rebut the hearsay.

During the State's rebuttal in the penalty phase, Detective Crawford testified that in September, 1993, he had received some information that an inmate named Alejandro Lago possessed relevant information about this case. (T. 4064-65). At that point, the defense objected to the detective relating any information he had learned from Lago. The defense claimed that during Lago's deposition, it became apparent that his testimony was so absurd, that the prosecutor told the defense that Lago would not be used as a witness. (T. 4069). The prosecutor confirmed that he told the defense that he would not be calling Lago as a witness. (T. 4073). Instead, the prosecutor sought to elicit Lago's story through Crawford. Crawford proffered that Lago had told him that the defendant had said that he wasn't crazy and that he just used his pills to get high. (T. 4066-67, 4073). The defense responded by stating that once they were told by the prosecutor that Lago would not be used at trial, they did not investigate him. (T. 4074). The defense also objected on the ground that Crawford's testimony was unreliable hearsay, because it was based upon statements made by Lago, a multiple convicted felon of questionable veracity. (T. 4069-70, 4075-76). The court recognized that the defense had been placed in a position where they could not rebut Lago's claims, because they did not investigate Lago's story after relying on the State's assurance that Lago would not be called as a witness. (T. 4073). Nevertheless, the court overruled the defense objection and permitted Crawford to relate what Lago had told him. (T. 4073, 4375). The defense then interposed a continuing objection to Crawford's testimony on the point. (T. 4075-77).

Crawford testified that Lago was a cellmate of the defendant, who had been charged with and convicted of attempted first degree murder. (T. 4076-77). Lago told Crawford that the defendant had said that he did not need his medication and that he only used his medication to get high in jail and to trade to inmates for favors. Lago also said that the defendant knew that he had to act insane or the police would connect him to other crimes.[30] At Crawford's request, Lago produced pills and liquid of the type that had been prescribed for the defendant. (T. 4077-4083).

Crawford's testimony plainly constituted double hearsay; Crawford was relating what Lago had told him about statements that the defendant had allegedly made. The substance of the statements, together with the circumstances in which they were made, plainly indicate that no exception to the hearsay rule is applicable to either of the statements. As double hearsay, Crawford's testimony should only have been admitted if the defendant had had a fair opportunity to rebut the hearsay statements contained therein. Section 921.142 (2), Florida Statutes.[31] Under the circumstances present in this

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[30] The defendant objected to the suggestion that the defendant could be connected to "other crimes." (T. 4079). Although the trial court sustained the defendant's objection, the defendant's subsequent motion for mistrial, premised upon the improper remark, was denied by the trial court. (T. 4082). The comment was improper because it suggested to the jury that the defendant was involved in other uncharged criminal activity, which under the circumstances, constituted inadmissible evidence of a non-statutory aggravating circumstance. *Geralds v. State*, 601 So. 2d 1157 (Fla. 1992); *Hildwin v. State*, 531 So. 2d 124 (Fla. 1988).

[31] Since Crawford's testimony constituted double hearsay, the statute, by its own terms, arguably does not apply, thereby precluding the admissibility of such unreliable testimony. As this Court has noted, "while the rules of evidence have been relaxed somewhat for penalty proceedings, they have not been rescinded." *Griffin v. State*, 639 So. 2d 966, 970 (Fla. 1994), quoting from *Hitchcock v. State*, 578 So. 2d 685, 689 (Fla. 1990), *vacated on other grounds*, 112 S. Ct. 3020 (1992).

case, it is clear that the defendant did not have a fair opportunity to rebut the statements. The highly prejudicial hearsay should not have therefore been admitted.

In *Rhodes v. State*, 638 So. 2d 920 (Fla. 1994), a case markedly similar to the case at bar, a former police officer was testifying during the penalty phase about the circumstances of the defendant's prior robbery conviction. During the officer's testimony, the officer referred to the contents of a report made by a doctor at the time of the defendant's arrest on the prior charge. The officer, over defense hearsay objections, testified that from the report, [the defendant] did not appear to have a mental condition.[32] This Court held that it was error to permit the officer to testify regarding the contents of the report, since the defense had no opportunity to rebut the report. However, since the reference to the report was very brief, and the State did not rely on the reference to the report later in the case, this Court held that the error was harmless. See also, *Gilliam v. State*, 582 So. 2d 610 (Fla. 1991), (admission of hearsay report regarding the defendant's attack on his infant son was deemed to be error, where the defendant did not have an opportunity to rebut the report); *Engle v. State*, *supra*, (admission of hearsay statements made by a non-testifying co-defendant at penalty phase error, where the defendant was denied opportunity to cross-examine and confront co-defendant); and *Gardner v. State*, 480 So. 2d 91 (Fla. 1985), (admission of police officer's testimony relating hearsay statements of non-testifying co-defendant was error, where the defendant was denied the opportunity to cross-examine and confront the co-defendant).

In the present case, the trial court erroneously permitted Detective Crawford

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[32] The defendant's mental state was an issue during the penalty phase.

to testify regarding highly prejudicial double hearsay, even though the court recognized that the defendant had been unfairly placed in a position of being unable to rebut the content of Crawford's testimony. This is so, because the prosecutor had improperly misled the defense into believing that the substance of Lago's claims would not be presented; the prosecutor agreed that he had told the defense that Lago would not be called as a witness. (T. 4073). In reliance upon the prosecutor's representation, the defense did not investigate Lago's claims any further. The defense was therefore in no position at the time of the penalty phase, to mount an effective rebuttal to the substance of Lago's claims.

To permit Crawford's recitation of Lago's story was particularly damaging in this case, since it's purpose was to undercut the defendant's primary mitigation theme that had been presented to the jury; that the defendant suffered from a major mental illness that mitigated his conduct in this case. Essentially, the jury was told by Crawford that Lago had told him that the defendant's illness was a sham. Since the defendant had no fair opportunity to investigate Lago or to test the reliability and truth of his story by cross-examination, the jury may well have accepted Lago's untested story to the detriment of the defense's entire mitigation case.

Unlike the situation in *Rhodes*, *supra*, the State, in this case, used Crawford's hearsay testimony in precisely that way during closing argument:

> What else do we know about the defendant? We know that after his arrest, he is talking to another guy in his cell. Gives him the drugs. Says "I don't take these. I use them to get high. Here, you take them."[33]

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[33] Although the prosecutor argued that Lago had given Crawford some pills that Lago had received from the defendant, Crawford did not confirm in his testimony that

> The police send them to the crime laboratory and those are the drugs prescribed for the defendant. His drugs. They end up in the hands of somebody else. And what does that other person tell the police officers? "He was telling me he was acting crazy, he was playing crazy." That is after he's arrested on this crime, acting crazy, playing crazy.
>
> That is mitigation? That is a reason, that is a justification for making a life recommendation given what his life has been like?

(T. 4240).

The trial court's ruling regarding the hearsay testimony of Detective Crawford plainly served to severely damage the defendant's case before the jury in the penalty phase, and to deny the defendant his rights to confront and to due process, guaranteed to him by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 6 and 9, of the Florida Constitution. The defendant's death sentences must therefore be vacated and this cause remanded with directions to conduct a new sentencing hearing in accordance with the aforementioned constitutions.

VI

THE TRIAL COURT ERRED WHEN IT LIMITED THE DEFENDANT'S PRESENTATION OF MITIGATION EVIDENCE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH

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the pills had come from the defendant. Crawford only testified that he requested Lago to produce some pills, that Lago did so and that the pills were of a type taken by the defendant. (T. 4080). Subsequently, the defendant informed the court that medication is dispensed in the jail in a manner that would have made it easy for Lago to obtain the defendant's pills without the defendant's knowledge. (T. 4085). The jury did not hear the defendant's information because the defendant would not agree to surrender his constitutional right not to testify. (T. 4147).

AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION.

During the penalty phase, the defense elicited testimony from Dr. Rosalind Pass appointed to examine the defendant with reference to a criminal prosecution in 1977. (T. 3628-31). Dr. Pass stated that as part of her examination, she administered a comprehensive battery of tests designed to determine the existence and nature of any mental disorder in the defendant. (T. 3633-36). After concluding that the defendant was suffering from schizophrenia, Dr. Pass was asked by the defense whether she had come to a conclusion as to whether the defendant had the ability to know right from wrong. (T. 3641). The State objected to the question on relevance grounds. The State argued that the doctor's finding that the defendant was insane in 1977 was not relevant to his state of mind or character pertaining to the offenses before the court. (T. 3641-42). The defense responded that the defendant's ability to differentiate right from wrong was relevant to the severity of the defendant's illness.[34] The Court sustained the State's objection and refused to allow the doctor to testify that the defendant did not know right from wrong, because the defendant had not raised insanity as a defense. The Court noted that had the defendant raised insanity as a defense, the doctor's opinion would have been relevant. (T. 3642).

A review of the foregoing and the law in Florida, plainly demonstrates that the trial judge misapprehended the applicable standard for the presentation of mitigation

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[34] The defense subsequently elicited from Dr. Rothenberg, Dr. Tarpin, Dr. Garcia and Dr. Jarrett that based upon the nature of the defendant's illness, the illness first diagnosed in 1977 would have likely persisted through the time of the homicides in 1984. (T. 3707, 3755, 3770, 3841).

evidence in a death penalty proceeding. In fact, the Court's refusal to permit the doctor's testimony on this relevant issue resulted in an unconstitutional limitation of the defendant's right to present mitigation evidence for the jury's and the court's consideration. A new sentencing hearing is required.

It is now a well-established principle of capital case jurisprudence, that a defendant is constitutionally entitled to present, and have the jury and the court consider, any mitigating factor that the defendant can produce. *Skipper v. South Carolina*, 476 U. S. 1, 106 S. Ct. 1669 (1986); *Eddings v. Oklahoma*, 455 U. S. 104, 102 S. Ct. 869 (1982); *Lockett v. Ohio*, 438 U. S. 586, 98 S. Ct. 2954 (1978); *Maxwell v. State*, 603 So. 2d 490 (Fla. 1992). Consistent with this constitutional entitlement, the defendant sought to elicit mitigating evidence that was relevant to the statutory mitigators found in Section 921.141 (6)(b) & (f), that the crime was committed while the defendant was under the influence of extreme mental and emotional disturbance and that the defendant lacked the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. Dr. Pass was specifically asked, and as the State clearly understood, was prepared to answer that the defendant's mental disorder prevented him from knowing right from wrong. Dr. Pass' opinion was relevant because it lent color to the depth of the defendant's mental illness; an illness that four other doctors testified would have persisted through the time of the homicides in 1984. Yet, despite the clear relevance of this testimony, the trial court limited the defendant's right to present this mitigating evidence, in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida Constitution.

In *Ponticelli v. State*, 593 So. 2d 483 (Fla. 1991), *vacated on other grounds*, 113 S. Ct. 32 (1993), this Court considered the relevance of markedly similar testimony in a slightly different context. In *Ponticelli*, the defendant contended that it was error for the trial court to have permitted the State to elicit an opinion from a doctor concerning the defendant's ability to differentiate between right and wrong and to understand the consequences of his actions. While this Court recognized that the testimony was relevant to a determination of the defendant's sanity, this Court held that the trial court properly permitted the testimony, because it was relevant to a determination of the existence of the mitigating circumstances in Section 921.141 (6)(b) & (f).

Similarly to the State in *Ponticelli*, the defense in this case sought to elicit opinion testimony that was relevant to the statutory mitigators in Section 921.141 (6)(b) & (f), as well as to possible non-statutory mitigation centered around the defendant's mental illness. Contrary to this Court's ruling in *Ponticelli*, the trial court below improperly refused to permit the defense to elicit, and to have the jury and the court consider, this highly relevant mitigating evidence. The jury's recommendation and the court's sentence, which were based upon a record that did not include all mitigating evidence that the defense sought to present, must be considered to be invalid. *Skipper v. South Carolina, supra.* The defendant's death sentences must therefore be vacated and this cause remanded for a new sentencing hearing to be held consistent with the foregoing constitutional principles.

VII

THE TRIAL COURT ERRED WHEN IT

SEPARATELY CONSIDERED AND WEIGHED THE FELONY MURDER AND PECUNIARY GAIN AGGRAVATING CIRCUMSTANCES, SINCE BOTH AGGRAVATING CIRCUMSTANCES REFERRED TO THE SAME ASPECT OF THE OFFENSE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In its sentencing order, the trial court found that both the felony murder aggravating circumstance, Section 921.141 (5)(d), Florida Statutes, and the pecuniary gain aggravating circumstance, Section 921.141 (5)(f), Florida Statutes, applied to this case and assigned both of those aggravators great weight. (R. 1750-52, 1758). The court considered the aggravators separately, based upon its theory that the murders had been committed during the commission of an armed burglary. In its order, the court specifically noted that it had not improperly doubled aggravating factors, because the court had made a conscious effort not to weigh the evidence that demonstrated that the murders had also been committed during the course of an armed robbery. (R. 1758).

It has long been the law in Florida, that a doubling of aggravating circumstances is improper where the aggravating circumstances refer to the "same aspect" of the crime. *Provence v. State*, 337 So. 2d 783, 786 (Fla. 1976), *cert denied*, 431 U. S. 969 (1977). As such, if the motivating purpose for the defendant's commission of the burglary of Josephs' apartment was pecuniary gain, it would have been improper to double the felony murder aggravator with the pecuniary aggravator. *Cherry v. State*, 544 So. 2d 184 (Fla. 1989). A review of the record clearly establishes that pecuniary gain was

precisely the purpose for the defendant's commission of the Joseph burglary. As such, it was error for the trial court to have separately found and weighed the felony murder and pecuniary gain aggravators.

At trial, the co-defendant, Luis Rodriguez, testified that the defendant came up with an idea for making some "quick money" during a telephone call between the two of them. (T. 2763-64). After the co-defendant arrived in Miami, the defendant told him that his landlord would be the robbery victim. (T. 2795-96). The defendant then constructed a plan which would enable them to gain entry into the Josephs' apartment by pretending that the defendant's wife was being held hostage in his own apartment. (T. 2797-2803). Thereafter, the defendant and the co-defendant entered the Josephs' apartment, took money and property belonging to the Josephs and Mrs. Abraham and committed the murders charged herein. (T. 2806-31).

Based upon the foregoing, it is clear that the sole purpose for the defendant's entry into the Josephs' apartment was pecuniary gain. Under circumstances similar to those in the instant case, this Court has condemned the doubling of the felony murder and pecuniary gain aggravating circumstances.

In *Cherry v. State*, *supra*, the defendant entered the victims' home and stole some property because "he needed some money." Days later, the burglary victims were found dead in their home. Based upon these facts, this Court found error in the trial court's separate consideration of the felony murder and pecuniary gain aggravating factors. Noting that the sole purpose for Cherry's burglary was pecuniary gain, this Court determined that the two aggravators should have been considered as a single aggravating

circumstance.

Similarly, in *Davis v. State*, 604 So. 2d 794 (Fla. 1992), the defendant was convicted of first degree murder, armed robbery and burglary, after he entered the home of an elderly victim, stabbed her to death and removed her property. Based upon the defendant's burglary of the victim's home, the trial court separately considered both the felony murder and pecuniary gain aggravating circumstances. This Court found that it was error to double those aggravators because the purpose of the defendant's burglary was pecuniary gain. See also *Campbell v. State*, 571 So. 2d 415 (Fla. 1990), (improper doubling of felony murder and pecuniary gain aggravators, where burglary committed for pecuniary gain); and *Mills v. State*, 476 So. 2d 172 (Fla. 1985), (same).

Notwithstanding the trial court's stated intention to avoid an improper doubling of aggravating circumstances, this record clearly demonstrates that that is precisely what the court accomplished. The record amply establishes that the sole purpose for the defendant's burglary of the Josephs' apartment was pecuniary gain. As such, it was error for the court to separately consider and assign great weight to *both* the felony murder and pecuniary gain aggravating circumstances. This Court should therefore vacate the defendant's death sentences and remand this cause with directions to reweigh the remaining aggravating and mitigating circumstances, as modified by this Court.

VIII

THE TRIAL COURT ERRED IN FINDING THAT THE STATE HAD ESTABLISHED THAT THE HOMICIDE HAD BEEN COMMITTED IN A

COLD, CALCULATED AND PREMEDITATED MANNER, WHERE THE EVIDENCE INTRODUCED WAS LEGALLY INSUFFICIENT TO SUSTAIN THAT AGGRAVATING CIRCUMSTANCE.

In its sentencing order, the trial court found that the evidence had established the statutory aggravating circumstance under Section 921.141(5)(I), Florida Statutes; that the capital felony was a homicide and was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification. (R. 1758-60). A review of the record reveals that in fact, there was insufficient evidence to establish that aggravating circumstance beyond a reasonable doubt.

In *Jackson v. State*, 648 So. 2d 85 (Fla. 1994), this Court sought to provide guidance in the application of the terms employed by the Legislature in Section 921.141(5)(I). To apply the "CCP" aggravating circumstance, the homicide must be "cold", that is, the killing must involve "calm and cool reflection." *Jackson, supra* at 88; *Richardson v. State*, 604 So. 2d 1107, 1109. *And*, the killing must be "calculated"; it must be the product of a careful plan or prearranged design to kill, formulated prior to the fatal incident. *Jackson, supra* at 89; *Rogers v. State*, 511 So. 2d 526, 533 (Fla. 1987). *And*, the killing must be the result of "heightened premeditation", to distinguish homicides that require application of the CCP aggravating circumstance from the premeditation required for conviction of first degree murder. *Jackson, supra*, at 88-89; *Rogers, supra*, at 533. Finally, the killing must be without pretense of moral or legal justification. *Jackson, supra*, at 89; *Banda v. State*, 536 So. 2d 221 (Fla. 1988).

To differentiate a first degree murder from the first degree murder that merits application of the CCP aggravator, the evidence must sustain the presence of each of the elements of CCP; "cold", "calculated" and "premeditated". *Jackson v. State*, *supra*. As such, the CCP statutory aggravator was intended to apply to "murders more cold-blooded, more ruthless, and more plotting than the ordinarily reprehensible crime of premeditated first degree murder," *Porter v. State*, 564 So. 2d 1060, 1064 (Fla. 1990), such as executions, contract murders or witness elimination killings. *Dailey v. State*, 594 So. 2d 254, 259 (Fla. 1992); *Green v. State*, 583 So. 2d 647, 652 (Fla. 1991); *Perry v. State*, 522 So. 2d 817, 820 (Fla. 1988).

The record in this case demonstrates that the homicides of Bea Joseph, Sam Joseph and Genevieve Abraham did not meet the standards reserved for application of the CCP aggravator.

To establish the CCP aggravator, the State relied principally on the testimony of the co-defendant, Luis Rodriguez. The co-defendant claimed that in December, 1984, the defendant first raised the subject of having the co-defendant assist him in the perpetration of a robbery. (T. 2763-64). The intended victim was to be Sam Joseph, the defendant's landlord. (T. 2796). Prior to the robbery, the defendant instructed the co-defendant to tell Joseph that the co-defendant and a friend were holding the defendant's wife hostage. The co-defendant was also told to demand money and jewelry. (T. 2797, 2799, 2802).

At the Josephs' door, the defendant gave the co-defendant a gun. When Mr. Joseph opened the door, the defendant told Joseph that the co-defendant was holding his

wife hostage. (T. 2804, 2806). When Joseph hesitated, the defendant pushed the door open and entered the Josephs' apartment with the co-defendant. (T. 2806). Once inside, the defendant gave the co-defendant a pair of gloves to use while searching the premises for property. (T. 2810). When the co-defendant gave the defendant a gun that he had found in the apartment bedroom, the defendant became outraged. (T. 2817-18). Since Joseph had earlier offered to retrieve property from the bedroom, the defendant angrily accused Joseph of making an effort to obtain the gun found by the co-defendant to use against the defendant and the co-defendant. (T. 2818-19). After the argument calmed for a short period, the defendant and Mr. Joseph again engaged in a loud and vulgar argument. (T. 2820-21, 2826-27). It was during this second heated exchange that the defendant suddenly fired his gun at both Mr. and Mrs. Joseph. (T. 2827-28). The defendant then heatedly urged the co-defendant to shoot Mrs. Abraham. (T. 2828-29). The co-defendant fired a shot at Mrs. Abraham, striking her in the head. (T. 2831).

The foregoing clearly establishes that the defendant and the co-defendant planned to rob the Josephs. Their intention to commit a robbery, however, is plainly insufficient to satisfy the standards for the CCP aggravator. This Court has held on numerous occasions that a plan to commit the underlying felony, in a felony murder scenario, is irrelevant to the heightened premeditation and carefully calculated design to kill necessary for application of the CCP aggravator: *Geralds v. State*, *supra*, (defendant planned burglary for a week by ascertaining the whereabouts of the occupants of a home; brought gloves, a change of clothes and plastic ties with him to the house; defendant fatally stabbed victim during burglary - held that CCP factor not proven by evidence of

extensive pre-felony planning, that did not necessarily encompass full contemplation of murder); *Hamblen v. State*, 527 So. 2d 800 (Fla. 1988), (defendant shoots robbery victim/store clerk after becoming angry because the victim had pressed an alarm button - held that CCP factor not proven - defendant's conduct not the product of calculated design to kill, but rather a spontaneous act done during course of robbery); *Hardwick v. State*, 461 So. 2d 81 (Fla. 1984), (defendant raped and strangled victim after victim had refused the defendant's demand for money - held that CCP factor not proven - for purposes of CCP, defendant's fully formed premeditated intent to rob victim cannot be transferred to a murder which occurs in the course of the robbery); *Vining v. State*, 637 So. 2d 921 (Fla. 1994), (defendant met with victim on several occasions concerning the defendant's interest in buying the victim's diamonds; on the last occasion, the defendant shot the victim and stole the jewelry - held that CCP factor not proven - for purposes of CCP, calculated plan to rob victim does not establish calculation and heightened premeditation to kill victim); *Lawrence v. State*, 614 So. 2d 1092 (Fla. 1993), (defendant entered convenience store after having procured a firearm with the intention of robbing the store; store clerk shot and killed and store proceeds taken - held that CCP factor not proven - intention to commit robbery and procurement of firearm to that end are insufficient to establish the elements of CCP). See also *Castro v. State*, 644 So. 2d 987 (Fla. 1994) and *Power v. State*, 605 So. 2d 856 (Fla. 1992).

In its sentencing order, the trial court supported its finding of the CCP aggravator by noting that the defendant had formulated both a plan to rob the Josephs and a "back-up plan." The back-up plan, to be used if the defendant's initial ruse failed, called

for the defendant to force his way into the Josephs' apartment, rob the Josephs and then murder them. The court theorized that murdering the Josephs was necessary because the defendant was known to his landlords. The court found support for the alleged existence of the "back-up" plan in the fact that the defendant had armed himself with a handgun and latex gloves before entering the Josephs' apartment. (R. 1759).

The problem with the trial court's finding regarding the existence of the defendant's alleged "back-up" plan, is that there is simply no evidence in the record to support it. There was absolutely no testimony from Luis Rodriguez to suggest that there had been any discussion between the defendants of a plan to kill the Josephs, before the incident was set in motion. The defendant's spontaneous shooting of the Josephs, done in the midst of a heated argument with Mr. Joseph, simply does not establish that the defendant's shooting of the Josephs was "calculated", i.e., the product of a careful plan or prearranged design to kill, formulated prior to the fatal incident. *Jackson*, *supra* at 89; *Rogers v. State*, *supra* at 533 (Fla. 1987).

To illustrate, in *Barwick v. State*, 660 So. 2d 685 (Fla. 1995), the defendant observed the victim sunbathing, returned to his home, got a knife from his house, gloves and a mask and returned to the victim's home to rob her. When the victim resisted, the defendant stabbed her to death. Based upon the foregoing, this Court found that the record did not demonstrate that the defendant had a careful plan or prearranged design to kill the victim. Barwick's plan was to rob the victim; the murder was therefore found not to have been committed in a "calculated" manner so as to justify the application of the CCP aggravator.

Similarly, in *Wyatt v. State*, 641 So. 2d 1336 (Fla. 1994), the defendant and a co-defendant entered a restaurant and robbed the employees. During the twenty minutes in which they were engaged in the robbery, the defendant pistol whipped one of the victims and then raped a second. The defendant then shot and killed each victim, one at a time. This Court found that on the record presented, there was insufficient evidence to sustain the level of premeditation required for CCP. Implicit in this Court's opinion was that even though the defendant had the time to formulate a design to kill during the defendant's slow, methodical and calculated killing of each victim, the evidence was still lacking to demonstrate the careful planning that is inherent in the CCP aggravator.

The trial court also justified its CCP finding by relying upon a statement that the defendant had allegedly made to Maria Malakoff, which Malakoff subsequently repeated in her formal investigatory statement to the police. (T. 1760, T. 3047-50). The statement, that the defendant "made sure they were dead," was introduced through Detective Nyberg as impeachment of Malakoff's courtroom testimony. In court, Malakoff denied that the defendant had made the statement to her. (T. 2704, 3057). Although the court correctly instructed the jury that Malakoff's police statement was to be used as impeachment of Malakoff's trial testimony only, and not as substantive evidence, the trial court erroneously relied on the police statement for its finding of the CCP aggravator. (R. 1760, T. 3050).

In *Dudley v. State*, 545 So. 2d 857 (Fla. 1989), the State called the defendant's boyfriend as a court witness. During the boyfriend's testimony, the State impeached the boyfriend with a prior statement the boyfriend had made to the police

during their investigation of the subject homicide. In his police statement, the boyfriend had said that he had heard the defendant discuss "knocking off the [victim] and stealing her rings." The foregoing police statement was subsequently used to establish the CCP aggravating circumstance. This Court held that it was error to use the police statement as substantive evidence of the CCP aggravator, because the police statement was hearsay that could only have been used as impeachment of the credibility of the boyfriend.[35]

Finally, in its sentencing order, the court found support for its CCP finding in the fact that the victims had been shot in the head, in an execution style. (R. 1759-60). Although, as related previously, the record establishes that the victims were shot in the midst of a heated argument between the defendant and Mr. Joseph, the fact remains that the victims were shot in the head. This Court has held, however, that a gunshot wound to the head, in an "execution-style," is not sufficient to establish the elements of the CCP aggravating circumstance.

In *Wyatt v. State*, 641 So. 2d 355 (Fla. 1994), the defendant was seen leaving a bar with the victim. A short time later, the defendant was seen driving the victim's car. The victim was subsequently found in a ditch with a gunshot wound to the top of her head. The wound was found to be consistent with that caused in an "execution-style killing." Finding a lack of evidence to demonstrate a careful plan or prearranged design to kill, this Court concluded that the evidence was insufficient to establish the CCP

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[35] Pursuant to Section 90.801(2)(a) and this Court's decision in *State v. Delgado-Santos*, 497 So. 2d 1199 (Fla. 1986), a law enforcement investigation yielding a sworn witness statement, does not qualify as an "other proceeding" so as to permit the use of the statement as substantive evidence at trial.

aggravator.

In this case, the record establishes only that the defendant had planned the commission of a robbery at the Josephs' apartment. There is a complete absence of evidence demonstrating a careful plan or pre-calculated design to kill that is the hallmark of CCP killings. *Geralds, Barwick, Wyatt.* Instead, the record supports the notion that the defendant spontaneously shot the Josephs and urged the co-defendant to shoot Abraham, as the culmination of a heated argument between the defendant and Mr. Joseph. (T. 2826-29). The absence of compelling evidence to refute this scenario, together with the absence of evidence demonstrating heightened premeditation and a calculated and carefully designed plan to kill, renders the evidence legally insufficient to sustain the trial court's finding that the CCP aggravating circumstance applied to the homicides of the Josephs and Mrs. Abraham. *Geralds v. State*, *supra*; *Hamblen v. State*, *supra*.

In it sentencing order, the trial court expressly found that if the CCP aggravator was not sustained on appeal, the remaining aggravating circumstances would still outweigh the mitigating circumstances it found to exist. (R. 1789). Nevertheless, the defendant urges this Court to strike the CCP aggravator and to vacate the defendant's death sentences with directions to remand this cause for resentencing, should this Court find merit to any of the other penalty phase issues raised by the defendant in this appeal.

IX

THE TRIAL COURT ERRED IN FINDING THAT THE HOMICIDE HAD BEEN COMMITTED TO AVOID OR PREVENT A LAWFUL ARREST,

WHERE THE EVIDENCE INTRODUCED WAS LEGALLY INSUFFICIENT TO SUSTAIN THAT AGGRAVATING CIRCUMSTANCE.

In its sentencing order, the trial court found that the evidence had established the statutory aggravating circumstance under Section 921.141(5)(e), Florida Statutes; that the capital felonies were committed for the purpose of avoiding a lawful arrest. (R. 1752-57). A review of the record reveals that there was insufficient evidence to establish that aggravating circumstance beyond a reasonable doubt.

This Court has long held that in order to find the "avoid arrest" aggravating circumstance when the victim is not a law enforcement officer, there must be very strong and clear proof that the sole or dominant motive for the murder was the elimination of the witness. *Perry v. State*, 522 So. 2d 817 (Fla. 1988); *Scull v. State*, 533 So. 2d 1137 (Fla. 1988). "The fact that witness elimination may have been one of the defendant's motives is not sufficient to find this aggravating circumstance." *Davis v. State*, 604 So. 2d 794 (Fla. 1992).

In this case, the record does not contain strong and compelling proof that the defendant's sole or dominant purpose for murdering the Josephs and Mrs. Abraham was to eliminate them as witnesses.

As discussed in the previous argument, Luis Rodriguez testified that during the time that he and the defendant were in the Josephs' apartment, the defendant and Mr. Joseph became embroiled in a heated and vulgar argument. (T. 2817-19). The argument began after the discovery by the co-defendant of a gun that the defendant believed Mr.

Joseph had tried to surreptitiously obtain. (T. 2817-19). The argument abated for a few moments while the defendant looked around the apartment. (T. 2820-21). After Mrs. Abraham entered the Josephs' apartment, the heated argument between the defendant and Mr. Joseph began again. (T. 2826-27). It was during this second argument that the defendant shot the Josephs. (T. 2827). Immediately thereafter, the defendant loudly urged the co-defendant to shoot Mrs. Abraham. (T. 2829).

On these facts, which had been elicited by the State, it is reasonable to conclude that the Josephs and Mrs. Abraham were killed during a loud and vigorous argument between the defendant and Mr. Joseph, and not as the product of the defendant's willful intent to eliminate witnesses. The trial court recognized this view of the evidence in its sentencing order, but mistakenly dismissed it because the court was under the impression that the Josephs had been shot during the respite after the first portion of the argument between Mr. Joseph and the defendant. (R. 1754-55). On this record, however, it is clear that the trial court's recollection of the evidence was simply erroneous. The co-defendant plainly stated that the defendant and Mr. Joseph had resumed their violent, verbal clash at the time the shots were fired. (T. 2826-27).

On similar facts, this Court, in *Perry v. State*, *supra*, found that the evidence was lacking to demonstrate that the defendant's purpose in killing his robbery victim was to avoid arrest. In *Perry*, though the defendant was known to the victim, the existence of evidence to suggest that the defendant had either "panicked" or "blacked out" during the murder, rendered the evidence insufficient to sustain the "avoid arrest" aggravator.

In support of its order, the trial court relied upon the fact that the defendant

was known to the Josephs and that the defendant had brought a gun and gloves with him to the Josephs' apartment, as part of a "back-up" plan to kill the Josephs at the conclusion of the robbery. (R. 1757-58). As discussed previously, there is absolutely nothing in the record to support the notion that the defendant had a secondary plan which involved murder. Although the defendant and the co-defendant talked on the phone and in person about the Joseph robbery, there was absolutely no discussion about the use of force or a plan to kill the Josephs. (T. 2795-2827). Additionally, given the absence of any discussion about the use of force, on this record, it is pure conjecture to assume that the gloves were taken to the Josephs' apartment solely as part of a plan to eliminate witnesses. The defendant and the co-defendant obviously could have made use of the gloves as a means to avoid leaving fingerprints.[36] Finally, although it is apparent that the defendant was previously known to the Josephs, this Court has frequently held that the victim's familiarity with the defendant is insufficient to prove an intent to kill to avoid arrest. *Davis v. State*, *supra,* (the defendant had done work for the victim at the victim's home); *Bruno v. State*, 574 So. 2d 76 (Fla. 1991), (the defendant and the victim were friends); *Perry v. State*, *supra,* (the defendant was a former neighbor of the victim); *Floyd v. State*, 497 So. 2d 1211 (Fla. 1986).

Finally, the trial court erroneously relied upon Maria Malakoff's statement to

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[36] The use of gloves in this case was no more significant than the use of a silencer by the defendant in *Menendez v. State*, 368 So. 2d 1278 (Fla. 1979). While the silencer would clearly minimize the chance of detection, the absence of other evidence to demonstrate that elimination of a witness was the dominant motive for the murder of the victim, compelled this Court to conclude that the State had failed to prove the avoid arrest aggravator in *Menendez*.

the police, in conjunction with its analysis of the victim's bullet wounds, to conclude that the Josephs' and Mrs. Abraham were killed to eliminate them as witnesses. As discussed earlier, Malakoff, in her courtroom testimony, denied that the defendant had told her that he had shot anyone. (T. 2704). Her testimony was impeached with her statement to the police, in which she claimed that the defendant had told her that he had "made sure they were dead." (T. 3057). Although the court correctly instructed the jury that Malakoff's police statement was to be used as impeachment of Malakoff's trial testimony only, and not as substantive evidence, the trial court erroneously twice relied upon Malakoff's police statement for its finding of the "avoid arrest" aggravator. (R. 1754, 1757). *Dudley v. State*, *supra.*

Based upon the foregoing, it is clear that the State had not established beyond a reasonable doubt that the defendant's sole or dominant purpose in shooting the Josephs, and in urging the co-defendant to shoot Mrs. Abraham, was their elimination as witnesses. The insufficiency of evidence, together with the trial court's erroneous reliance upon evidence that had been introduced solely for impeachment purposes, should compel this Court to conclude that the trial court had erred in finding that the "avoid arrest" aggravator had been established by the State.

In it sentencing order, the trial court expressly found that if the "avoid arrest" aggravator was not sustained on appeal, the remaining aggravating circumstances would still outweigh the mitigating circumstances it found to exist. (R. 1789). Nevertheless, the defendant urges this Court to strike the "avoid arrest" aggravator and to vacate the defendant's death sentences with directions to remand this cause for resentencing, should

this Court find merit to any of the other penalty phase issues raised by the defendant in this appeal.

CONCLUSION

For the foregoing reasons, the defendant's convictions and sentences for first degree murder and armed burglary with an assault must be reversed and the case remanded for a new trial. Alternatively, the defendant's sentences of death must be vacated and the case remanded for new sentencing proceeding before a jury.

Respectfully Submitted,

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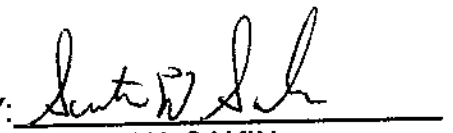
BY: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by mail to the Office of the Attorney General, Rivergate Plaza, 444 Brickell Avenue, Suite 950, Miami, Florida 33131, this 29 day of January, 1998.

BY: _____
SCOTT W. SAKIN