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

APPELLANT'S REPLY BRIEF

SCOTT W. SAKIN, P.A.
Counsel for:
Manuel Antonio Rodriguez
Special Assistant Public Defender
1411 N.W. North River Drive
Miami, Florida 33125
(305) 545-0007

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INTRODUCTION

In this reply brief, appellant's initial brief is cited as "Initial Br." and appellee's answer brief as "Answer Br." All other citations are as in the initial brief. Specific points raised in the initial brief but not addressed in the reply brief are not waived.

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.

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

In response to the defendant's claim that Detective Venturi had improperly commented upon the defendant's exercise of his right to remain silent during police questioning in 1985, the State primarily raises two arguments: 1) the defendant's claim was not properly preserved and 2) Venturi's testimony was not improper because the defendant had not actually invoked his constitutional right to silence. (Answer Br. P. 51-52). Neither State contention is supported by the record.

The defendant's objection to Venturi's comment came at the conclusion of the State's direct examination of Detective Venturi. (T. 2199). When the defendant made the

objection[1], defense counsel noted that he had waited for the State to conclude its questioning in order to help limit the number of sidebar conferences necessitated by the trial. (T. 2199). At the time, neither the State nor the Court gave any indication that the defendant's objection was not timely or properly made. Following discussion between the court and counsel for the State and the defense, the court found that Venturi's comment was improper, but did not necessitate a mistrial.[2] (T. 2200-01).

The purpose of the contemporaneous objection rule is to give trial judges an opportunity to address objections made by counsel at trial and to correct errors. *State v. Rhoden*, 448 So. 2d 1013 (Fla. 1984); *Simpson v. State*, 418 So. 2d 984 (Fla. 1982). The rule prohibits defense counsel from deliberately allowing known errors to go uncorrected, in hopes of gaining a possible second trial if the first should end unfavorably, and ensures that objections are made when the recollections of witnesses are freshest. *State v. Rhoden*, *supra* at 1016.

Based upon the foregoing interpretation of the contemporaneous objection rule, this Court as well as other courts in this State have held that objections need not necessarily be made at the moment of the impropriety, in order to be considered timely. In *Johnston v. State*, 497 So. 2d 863 (Fla. 1986), this Court rejected the State's contention that the

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[1] The objection was made two transcript pages (ten State questions) after the improper comment.

[2] The defendant rejected the court's offer of a curative instruction. (T. 2200-01). This Court has previously held in *James v. State*, 695 So. 2d 1229 (Fla. 1997), that defense counsel may choose not to have the court read a curative instruction to the jury and still preserve an improper comment for appeal by an objection and a motion for mistrial.

defendant had not properly preserved an improper comment, where the defendant's objection was not made until after four additional questions were asked and answered. In *Jackson v. State*, 451 So. 2d 458, 461 (Fla. 1984), this Court likewise rejected a State claim of non-preservation, where the defendant's objection was not made at the moment of the impermissible inquiry. This Court stressed that the defendant's objection was sufficiently timely because the trial court would have been allowed to fashion a curative instruction or consider a mistrial motion had the court been disposed to sustain the objection. See also *Sharp v. State*, 605 So. 2d 146 (Fla. 1st DCA 1992), (defense objection, made at the conclusion of the State's direct examination and subsequent to defense voir dire inquiry of the witness, held timely) and *Roban v. State*, 384 So. 2d 683 (Fla. 4th DCA 1980), (objection made four questions after improper remark held timely).

It is abundantly clear from this record that the trial court considered the defendant's objection to Detective Venturi's comment to be timely made. The trial court did precisely what the contemporaneous objection rule was designed to foster: the court sustained the defendant's objection and took the opportunity to consider several alternatives to correct the error. Based upon the decisions in *Rhoden, Simpson, Johnston, Jackson, Sharp* and *Roban*, the defendant properly preserved the court's ruling on Detective Venturi's comment for appellate review.

The State next contends that Detective Venturi's remark was not improper because the defendant did not actually invoke his right to remain silent. Instead, the State contends that Detective Venturi had merely called attention to the fact that his interview with the defendant had to be terminated because the defendant had become ill. (Answer Br. P. 52).

To be given credence, the State's argument requires a truly selective reading of the record and a disavowance of the prevailing law in Florida.

In response to State questioning, Detective Venturi described his custodial interview with the defendant in 1985:

> 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.*

(T. 2193).

Unquestionably, Detective Venturi left little to the jury's imagination in informing them that the defendant had grown silent in the face of police accusation and "refused to answer my [sic] more of my questions." The clarity of Detective Venturi's reference could only have left the jury free to infer the defendant's guilt from his silence, the very purpose that the Fifth Amendment was designed to protect against.

Detective Venturi's subsequent comments did not cure the prejudice. Detective Venturi did opine that he felt the defendant was getting sick. However, when he was asked whether his opinion was based upon something the defendant had said or something he had seen, Detective Venturi stated: "He was shaking. *I don't know if it was from crying or illness.*" (T. 2194).

Detective Venturi's uncertainty as to the cause of the defendant's shaking clearly does not support the State's leap of logic that Detective Venturi's remarks were simply references to an interview terminated because of illness. Instead, Detective Venturi's

remarks were *at least* "fairly susceptible" to interpretation by the jury that the defendant had voluntarily chosen to remain silent in the face of police accusation. *State v. Diguilio*, 491 So. 2d 1129 (Fla. 1986). At pages 51-52 of his Initial Brief, the defendant listed several controlling authorities that hold that comments markedly similar to those made here are constitutional error that require reversal of the defendant's conviction. The State's complete failure to discuss, let alone distinguish, any of the controlling precedent cited in the defendant's Initial Brief, further demonstrates the specious nature of the State's argument and the need for the relief requested by the defendant.

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

In response to the defendant's claim that the prosecutor twice commented upon the defendant's failure to testify, the State responds that the prosecutor's remarks were fair comments on the evidence and relies upon *Dufour v. State*, 495 So. 2d 154 (Fla. 1986), for its argument. In *Dufour*, the prosecutor remarked, "nobody has come here and said, Mr. Miller's testimony was wrong, or incorrect, or that that was not the deal he was offered." This Court found that in the context that it was made, the State's remark was a reference to the accuracy of Miller's testimony regarding his negotiations with law enforcement, as opposed to a reference to the defendant's failure to testify.

By contrast, in this case, the prosecutor remarked:

> "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?"....."This is not a story.....*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). In context, the prosecutor's remark was a clear reference to the fact that the defendant had not testified, thus the absence of a second side of the story.

Under the circumstances, the prosecutor's remark was fairly susceptible to interpretation by the jury as a reference to the defendant's failure to testify. Based upon the decisions in *Abreu v. State*, 511 So. 2d 1111 (Fla. 2d DCA 1987), *Rigsby v. State*, 639 So. 2d 132 (Fla. 2d DCA 1994) and *Carr v. State*, 561 So. 2d 617 (Fla. 5th DCA 1990), it was error for the trial court to have overruled the defendant's objection or denied the defendant's mistrial motion, which were based upon the prosecutor's improper remarks.

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 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.

The defendant has claimed that it was error for the trial court to permit the State to exercise a peremptory challenge against African-American juror Duval, because the justification given for the strike, that Duval had difficulty understanding the questions asked and in being understood in court, was both unsupported by the record and pretextual in

nature. The State's response, that the State's reason was genuine and supported by the record, is so rife with inaccuracies and misstatements regarding the record, that it should be ignored.

Initially, the State notes in its brief that the prosecutor challenged Duval for cause because she allegedly could not consider a guilty verdict based upon the testimony of a co-defendant who had plea bargained with the State. (Answer Br. p. 63-64). The State claims that the prosecutor's challenge was borne out by an exchange had between Duval and defense counsel:

> [Defense Counsel]: You heard what is the primary question I have been asking everybody. Miss Duval, being the person of goodness that you are how do you feel about what we have been talking about?
>
> [Duval]: For me the guy is innocent because -- we can't say he is guilty or not guilty.
>
> [Defense Counsel]: *When you say the guy is innocent you are talking about* --
>
> [Duval]: *For now because we don't know about this evidence.*
>
> [Defense Counsel]: *That's absolutely correct. The State must prove their case beyond a reasonable doubt.*[3] Suppose someone comes forward and has all the things we have been talking about that we shared that he has.
>
> For example, he is a killer, he has committed the homicides, he has told different stories, he has a reason for lying against my client.
>
> Can you keep an open mind to that or is the fact he's there pointing out my client enough for you to say he is guilty.

---

[3] The State excluded the italicized portion of the exchange between defense counsel and Duval from its brief. (Answer Br. p. 64).

I don't want to hear anything else?

[Duval]: I would have to hear about it. I can't say he is guilty.

(T. 1617-18). Based upon this exchange, the State in its brief claims that the prosecutor accurately characterized Duval's position as one where she could not find the defendant guilty, regardless of the testimony against the defendant, as long as the source of the evidence was his codefendant. (Answer Br. p. 64).

The State's conclusion in its brief is ridiculous. Duval never said that she could not accept the testimony of the codefendant. She did give an indication that she understood the defendant's presumption of innocence. When she was specifically asked whether she could keep an open mind about the co-defendant's testimony, she replied that she "would have to hear about it." (T. 1618). No reasonable juror could be expected to offer any more.

In its Answer Brief, the State reported that the trial judge's reaction to the State's cause challenge was that the judge "had had trouble hearing everything said by Duval, and thus called her for further questioning." (Answer Br. p.65). In fact, the judge reported more than just an occasional inability to hear juror Duval. The court stated that her recollection of Duval's answers was not the same as the prosecutor's:

> [The Court]: I don't have it down if she said that. I didn't catch everything she said. The only thing I have down is she said she would listen to everything, she would be a fair juror. Maybe we should bring her in and qualify it. There were things she did say that I didn't hear. I did not hear that.

(T. 1653).

After the court's inquiry of Duval regarding her consideration of a co-defendant's testimony (quoted in the Answer Brief, p, 65), the prosecutor questioned Duval further:

> [The Prosecutor]: Yes, your Honor. Good afternoon, Miss Duval. I had a little trouble hearing you. I wanted to ask you a few more questions.
>
> I think Mr. Zenobi [defense counsel] the other lawyer asked you today if you heard from a witness who was involved in this crime could you use that evidence, could you rely upon that evidence to find somebody guilty if that was the only evidence?
>
> [Duval]: Yes, sir.
>
> [The Prosecutor]: You could?
>
> [Duval]: Yes, sir.
>
> [The Prosecutor]: Maybe I misheard you. I thought before you said you would have trouble believing that kind of evidence?
>
> [Duval]: No, I didn't say that.
>
> [The Prosecutor]: Thank you, ma'am.

(T. 1655-56).

When it was apparent that the record did not support the prosecutor's challenge for cause, the prosecutor changed his attack and sought to exercise a peremptory challenge against Duval, based upon her "confusion"[4] regarding the proceedings. (T. 1656).

In support of the prosecutor's "genuine reason" for striking Duval, the State cites two alleged instances where defense counsel was "concerned" about Duval's ability to comprehend. (Answer Br. p. 66).

In the first instance, defense counsel, noting that Duval spoke with an accent, asked

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[4] When making the challenge, the prosecutor conceded that perhaps he was the one who was confused about Duval's answers. (T. 1656). The record supports the prosecutor's argument in that regard.

Duval whether she had any trouble understanding the proceedings. (T. 1619). Duval assured defense counsel that she understood everything. (T. 1619).

In the second instance, defense counsel was questioning the jury regarding whether they could consider all of the circumstances in the case in weighing the credibility of a particular witness. The following exchange, relied upon by the State in its Answer Brief, then occurred:

> [Defense Counsel]: All right. Miss Muchado, you understand what I'm saying?
>
> [Muchado]: Yes.
>
> [Defense Counsel]: Are you with me on that?
>
> [Muchado]: Yes.
>
> [Defense Counsel]: Miss Duval?
>
> [Duval]: Yes.

(T. 1627-28). Far from demonstrating any substantive concern about Duval's comprehension abilities, if anything, the exchanges between defense counsel and Duval demonstrate that Duval possessed the requisite ability to serve as a juror.

The defendant is well aware that this Court in *Melbourne v. State*, 679 So. 2d 759 (Fla. 1996), vested discretion in the trial court to assess the genuineness of a party's peremptory challenges. That discretion may only be said to be properly exercised, however, when there is record support for the trial court's determination. *Melbourne, supra; Nunez v. State*, 664 So. 2d 1109. 1112 (Fla. 3d DCA 1995). In this case, there was a total absence of record support for the State's claim that Duval did not possess the ability

to comprehend and communicate required for jury service. That absence of record support, coupled with the fact that the State asked Duval only three questions during voir dire (covering only basic background information), should have led the trial court to the conclusion that the State's reason for challenging Duval was not genuine. The court's decision to permit the peremptory challenge of an African-American juror, under the circumstances, constituted an abuse of discretion that should compel this Court to order that the defendant be afforded a new trial.

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.

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

On appeal, the defendant has claimed that the trial court reversibly erred in permitting testimony by Luis Rodriguez regarding two prior acts of violence committed by the defendant[5], that were not relevant to any material issue of fact before the jury. In response, the State claims that the defendant had conceded at trial that he had opened

[5] Rodriguez was permitted to testify that he had previously seen the defendant hit one man in the face with a stone and that he had seen the defendant beat a second man with a tire iron. (T. 2978-80).

the door to such testimony and now could not be heard to complain, and that the evidence of the violent acts were relevant to explain Rodriguez' fear of the defendant, an issue purportedly discussed by the defense in the cross examination of Rodriguez. (Answer Br. p. 68-74). Both State contentions are unsupported by the record.

Contrary to the State's claims, the entire issue stems from a brief exchange between defense counsel and Rodriguez during the cross examination of Rodriguez. In that exchange, defense counsel merely asked Rodriguez:

> Q: Now, you don't like my client. Is that a fair statement? Or not a fair statement?

In response, Rodriguez volunteered:

> 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.

(T. 2896). Rodriguez then confirmed that he did not care for the defendant, but did not tremendously dislike him. (T. 2896-97).

During the discussion that followed concerning the permissible scope of the State's re-direct examination, defense counsel Houlihan contended that his cross examination had not opened the door to the prejudicial evidence to be offered by the State. (T. 2949-50). Co-defense counsel Zenobi maintained that while there may have been a certain opening of the door, it did not justify the admission of evidence of the prior violent acts offered by the State. (T. 2950).

Zenobi's response clearly related to the fact that Rodriguez had volunteered two justifications for his dislike of the defendant: the manner in which the defendant had

treated Rodriguez' sister and the way the defendant had been a father to his child. Zenobi confirmed this notion by subsequently arguing to the court that Rodriguez had given a complete answer to defense counsel's leading question regarding his dislike for the defendant. (T. 2967-68).

The trial court, however, operated under the mistaken impression that defense counsel had asked Rodriguez "why" he had disliked the defendant. As a result, the court determined that the State should be permitted to have Rodriguez expand upon his answer. (T. 2961-62, 2967).

As was argued previously, the trial court's ruling was erroneous for two reasons. First, the defendant never asked the witness "why" he disliked the defendant. In fact, the defendant did not open the door to the extent found by the trial court. Second, as clearly stated by Rodriguez during the State's proffer, *Rodriguez' observation of the defendant's two previous violent acts did not give him reason to dislike the defendant; they gave him reason to fear him.* (T. 2959-60). Since defense counsel did not cross examine Rodriguez regarding his alleged fear of the defendant, the defendant's cross examination could not have opened the door to the acts testified to by Rodriguez.[6]

Finally, and perhaps most importantly, the State in its Answer Brief neglected to address the fact that Rodriguez' alleged fear of the defendant was not relevant to any

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[6] In footnote 26 of the State's Answer Brief, the State cites to a section of the defendant's cross examination which purportedly relates to Rodriguez' fear of the defendant. (T. 2928, 932-35). In fact, the cited portion of the transcript predominantly deals with Rodriguez' perception of his criminal responsibility for his conduct. Contrary to the State's assertion at page 73 of its Answer Brief, at no point during its cross examination did the defense ever directly attempt to demonstrate that Rodriguez' claim of fear of the defendant was false.

material fact in issue at trial.

It is well established in Florida that the State may not introduce evidence of the defendant's collateral criminal activity unless it is relevant to prove a material fact in issue and its probative value is not outweighed by unfair prejudice. Sections 90.401-90.404, Florida Statutes; *Craig v. State*, 510 So. 2d 857 (Fla. 1987) and *Thomas v. State*, 599 So. 2d 158 (Fla. 1st DCA 1992). In the instant case, as the State concedes in its brief, the theory of prosecution was that the defendant and Rodriguez had acted in concert when committing the burglary and murders charged. Given their mutual criminal responsibility and Rodriguez' guilty plea to the charges entered prior to trial, Rodriguez' subjective fear of the defendant, that arose during the criminal episode, was simply not relevant to any issue concerning the defendant's guilt of the crimes charged. As such, the violent acts attested to by Rodriguez 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 by Florida law. It was therefore error for the trial court to have permitted such highly prejudicial evidence to destroy the defendant's right to receive a fair trial.

2. Detective Venturi's reference to the fact that the defendant had a police ID number.

In response to the defendant's claim concerning the propriety of Detective Venturi's reference that the defendant had a police ID number, the State claims that the defendant did not properly preserve the claim for appellate review. Since the improper remark occurred during the same portion of Detective Venturi's testimony as did the claim raised in Issue I, *supra*, the defendant's response to the State's lack of preservation argument

made in Issue I, *supra*, is equally applicable here. Therefore, to save space and the Court's time, the defendant renews that previously made argument here.

As to the substance of the defendant's claim, the defendant rests on the argument raised in his Initial Brief.

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 response to the defendant's claim that the trial court had "improperly doubled" the felony murder and pecuniary gain aggravating circumstances, the State responds that the trial court's order was correct because the defendant's commission of a burglary violated the sanctity of the Josephs' home, a separate aspect of the crime of burglary which allegedly justified separate weighing of the two aggravators. (Answer Br. p. 85-86, 89). Given the trial court's finding that "pecuniary gain was the motivating factor which set the entire chain of events into motion" and the State's inability to distinguish the contrary controlling precedent cited in the defendant's Initial Brief, this Court should reject the State's argument. (R. 1758).

In support of its argument, the State primarily relies upon the decisions in *Brown v.*

State, 473 So. 2d 1260 (Fla. 1985) and *Bates v. State*, 465 So. 2d 490 (Fla. 1985).[7]

In *Brown*, the defendant broke into the victim's home, beat, raped, and strangled the victim and then stole her property. It was clear that the defendant was motivated by more than money when he entered the victim's home. As such, this Court rejected the defendant's claim that the trial court had improperly doubled the felony murder by burglary and pecuniary gain aggravators, because the burglary committed had a much broader significance than simply being the vehicle for theft. Similarly, in *Bates*, the defendant abducted the victim from her office, took her into the woods where he attempted to rape her. The defendant subsequently stabbed her to death and took jewelry from the victim's finger. This Court found no error in separate consideration of the felony murder by burglary and pecuniary gain aggravators. The defendant's commission of a kidnapping and attempted sexual battery indicated that the defendant was motivated by other reasons in addition to money.

In this case, as the trial court correctly found in its sentencing order quoted above, the record amply demonstrates that the defendant's motivating purpose for his entry into

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[7] The State also relies upon *Trepal v. State*, 621 So. 2d 1361 (Fla. 1993), in which this Court found no improper doubling in the trial court's separate consideration of both the "great risk of death to many persons" aggravator and the "prior violent felony" aggravator, where each of those circumstances dealt with a different aspect of the defendant's crime, and, *Toole v. State*, 479 So. 2d 731 (Fla. 1985), in which this Court found no improper doubling in the trial court's separate consideration of both the "great risk of death to many persons" aggravator and the "felony murder" by arson aggravator, where the felony of arson did not necessarily encompass a great risk of death to many people. Unlike the situations in *Trepal* and *Toole*, in this case, the "felony murder" by burglary aggravator and the "pecuniary gain" aggravator did encompass the same aspect of the defendant's crime; the defendant's motivation to steal money and property from the Joseph's.

the Joseph's home was pecuniary gain. (R. 1758, T. 2763-64, 2795-96, 2806-31). Where a defendant's purpose for the commission of a burglary was pecuniary gain, this Court has consistently held that the felony murder and pecuniary gain aggravators may not be separately weighed and considered.[8] *Davis v. State*, 604 So. 2d 794 (Fla. 1992); *Cherry v. State*, 544 So. 2d 184 (Fla. 1989); *Campbell v. State*, 571 So. 2d 415 (Fla. 1990) and *Mills v. State*, 476 So. 2d 172 (Fla. 1985). It was therefore error for the trial court to separately consider and assign great weight to both the felony murder and pecuniary gain aggravating circumstances. This Court should vacate the defendant's death sentences and remand this cause with directions to re-weigh 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 response to the defendant's contention that the evidence introduced at trial was legally insufficient to sustain the trial court's finding of the cold, calculated and

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[8] This Court has reached this conclusion notwithstanding the fact that each burglary of a dwelling, by definition, requires the defendant's breach of the "sanctity of the victim's home." The trial court's reliance on that "aspect" of the burglary offense for its separate weighing and consideration of the felony murder and pecuniary gain aggravators was therefore clearly in contravention of the established precedent of this Court. (R. 1750-52).

premeditated (CCP) aggravating circumstance, the State relies upon a series of cases that it claims supports the trial court's finding. A review of each of the State's cases, *Gordon v. State*, 704 So. 2d 107 (Fla. 1997), *Gamble v. State*, 659 So. 2d 242 (Fla. 1995), *Trepal v. State*, *supra*, *Brown v. State*, 565 So. 2d 304 (Fla. 1990), *Swafford v. State*, 533 So. 2d 270 (Fla. 1988), *Remeta v. State*, 522 So. 2d 825 (Fla. 1988), reveals strong evidence of each defendant's calculated intention to kill, justifying the application of the CCP aggravator, in stark contrast to the dearth of evidence on that significant factor in this case.

For example, in *Gordon v. State*, *supra*, the defendant and a co-defendant were specifically hired by the victim's wife to kill the victim. The defendant then remained at the victim's apartment until the victim appeared. The victim was found murdered shortly thereafter. This Court rejected the defendant's claim that he had only intended to commit a burglary, since the burglary could have been accomplished without having to wait for the victim to arrive. That fact, coupled with the fact that cash and credit cards had not been removed from the victim's apartment, established that the defendant's intention had been to kill the victim, and not to rob him.

In *Gamble v. State*, *supra*, the defendant clearly informed his girlfriend, one week prior to the murder, of his intentions to "take-out" the victim. The day prior to the murder, the defendant rehearsed its commission with his girlfriend. During the commission of the murder, the defendant repeatedly struck the victim in the head with a claw hammer. This Court found that the foregoing clearly sustained the CCP aggravator.

In *Trepal v. State*, *supra*, the defendant at least twice threatened the victim's family with death prior to the murder. The defendant then coldly poisoned the victim's soft drinks

with thallium poison. This Court found that the facts sustained a finding that the murder was committed in a cold and calculated manner.

In *Brown v. State*, *supra*, the defendant went to the victim's room to discuss with the victim why the victim had been telling lies about the defendant. The defendant told the police that he intended to shoot the victim if she yelled during their conversation. The defendant's psychologist confirmed that the defendant's shooting of the victim had been pre-planned. On these facts, this Court found the heightened premeditation necessary to justify application of the CCP aggravator.

In *Swafford v. State*, *supra*, the defendant shot the victim nine times, stopping during the firing spree to re-load. The pause to re-load demonstrated a time for reflection and therefore "heightened premeditation."

In *Remeta v. State*, *supra*, this Court found that the CCP aggravator had been sustained by the defendant's candid admission that he had committed the charged robbery with the pre-existing intention of eliminating all witnesses.

By contrast to the State's cases, there was no evidence in this case of any pre-existing intention in the defendant to kill the victims. Instead, the record plainly reflects that the defendant's intention upon entry into the Joseph's home was to burglarize the home and rob its occupants. (T. 2763-64). The victims in the case were not severely harmed until the defendant became outraged; an anger fostered by the defendant's belief that Mr. Joseph had attempted to gain access to a gun kept by the Josephs in their bedroom. It was in this fit of pique that the defendant fired the fatal shots and ordered the co-defendant to fire his weapon, killing Mrs. Abraham. (T. 2820-21, 2826-29, 2831). On

these facts, the defendant clearly did not possess the heightened premeditation and carefully calculated design necessary for application of the CCP aggravator.

This case should be controlled by this Court's earlier decision in *Geralds v. State*, 601 So. 2d 1157 (Fla. 1992). Geralds had worked as a carpenter during the remodeling of the victim's home. Subsequently, despite extensive pre-planning, which included the defendant bringing gloves, a change of clothes and plastic ties with him to the victim's house, the burglary went awry and resulted in the stabbing murder of the victim. This Court concluded that while the evidence supported a hypothesis encompassing premeditated murder, the evidence also sustained the possibility that the defendant had bound the victim, in an effort to compel the victim to reveal the location of money in the home, and had killed her in anger after he had become enraged by the victim's refusal to reveal the location. As such, this Court concluded that the CCP aggravator had not been established.

Similarly, in this case, the defendant planned the commission of a burglary and robbery of victims who were familiar with him. Despite his planning, the burglary and robbery took an even worse turn when the defendant became enraged by actions of the victim that he believed were designed to harm him. The shooting deaths of the victims were the direct result of that fit of anger. The State's failure to exclude this hypothesis,[9] which is so clearly inconsistent with the intention and design necessary for application of the CCP aggravator, should compel this Court to conclude that the trial court had erred in

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[9] In fact, the State's evidence supports this hypothesis since it is based upon the testimony of Luis Rodriguez, a State witness.

finding the CCP aggravator to be applicable.

Finally, the defendant had argued in his Initial Brief that the trial court's CCP finding was erroneous because the court had relied upon statements made by Maria Malakoff to the police, which had been admitted at trial only as impeachment of Malakoff's trial testimony. (Initial Brief, p. 92, R. 1760). In response, the State has argued that the cases relied upon by the defendant, *Dudley v. State*, 545 So. 2d 857 (Fla. 1989) and this Court's most recent pronouncement in this area, *Morton v. State*, 689 So. 2d 259 (Fla. 1997), were incorrectly decided. Both cases stand for the proposition that it is error to rely upon prior inconsistent statements as substantive evidence in the penalty phase. In doing so, this Court's *Dudley* and *Morton* decisions were entirely consistent with its prior decision in *State v. Delgado-Santos*, 497 So. 2d 1199 (Fla. 1986), in which this Court held that a statement made to police during a law enforcement investigation does not qualify as an "other proceeding," so as to permit the use of the statement as substantive evidence. Pursuant to *Dudley* and *Morton*, the trial court patently erred in relying on impeachment evidence as substantive evidence supporting the CCP aggravator. This Court should therefore strike the CCP aggravator and vacate the defendant's death sentences with directions to remand this cause for resentencing.

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 response to the defendant's claim that the trial court had erred in finding the "avoid arrest" aggravator, because witness elimination was not the sole or dominant motive for the murders charged herein, the State claims that the evidence does not support any other rationale for the murders other than witness elimination. (Answer Br. p. 96-97). In support of its argument, the State cites a series of cases which are readily distinguishable from the instant case.

For example, in *Stein v. State*, 632 So. 2d 1361 (Fla. 1994), *Harmon v. State*, 527 So. 2d 182 (Fla. 1988), *Herring v. State*, 446 So. 2d 1049 (Fla. 1984), and *Clark v. State*, 443 So. 2d 973 (Fla. 1983), the defendant's statements to the police or to others involved in the crime revealed a definite intent by the defendant to eliminate witnesses as a motivation for murder.

In *Swafford v. State*, *supra*, *Cave v. State*, 476 So. 2d 180 (Fla. 1985), and *Routly v. State*, 440 So. 2d 1257 (Fla. 1983), following the defendant's commission of a robbery, the defendant abducted the victim, removed the victim from the robbery scene and took the victim to a secluded location where the murder occurred. In each instance, the record was devoid of any justification for the removal of the victim to a secluded site other than for the commission of a murder to eliminate the victim as a witness.

In *Howell v. State*, 23 Fla. L. Weekly S90 (Fla. Feb. 12, 1998) and *Fotopoulos v. State*, 608 So. 2d 784, the defendants committed premeditated murder where the sole reason for the commission of the killings was to eliminate the victims as witnesses.

Finally, in *Thompson v. State*, 648 So. 2d 692 (Fla. 1994), the evidence revealed no reason or purpose for the killing of the robbery victims, other than to eliminate them as

witnesses, where the property had already been forcibly taken from the robbery victims at the time of the murders.

By contrast, in this case, the record clearly suggests a motivation for the murder of the victims that belies the notion that the defendant's sole and dominant design was to eliminate witnesses.[10] The State's witness, Luis Rodriguez, testified that the victims were killed during the commission of a robbery, after the defendant had become outraged by Mr. Joseph's purported attempt to gain access to a firearm kept in the Joseph's bedroom. It was only in that fit of rage that the defendant shot the Josephs and ordered Luis Rodriguez to shoot Mrs. Abraham. (T. 2820-21, 2826-29, 2831). As such, unlike the cases relied upon by the State, the record in this case clearly fails to demonstrate by strong and clear proof, that the defendant's sole or dominant motive for the murders was the elimination of witnesses. See, *Urbin v.* State, 23 Fla. L. Weekly S257 (Fla. May 7, 1998); *Perry v. State*, 522 So. 2d 817 (Fla. 1988); *Scull v. State*, 533 So. 2d 1137 (Fla. 1988) and *Davis v. State*, 604 So. 2d 794 (Fla. 1992).

Based upon the foregoing, 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.

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[10] As in Issue VIII, the defendant, in this issue, challenged the legality of the trial court's reliance on impeachment material as substantive evidence for its finding on this aggravator. (Initial Br. p. 97-98). As for Issue IX, in its answer brief, the State responded by relying on the position it took with reference to the same error in Issue VIII. (Answer Br. p. 97, fn. 52). By way of reply, the defendant will rely on his argument made, *supra*, at p. 21.