IN THE SUPREME COURT OF FLORIDA

JOAQUIN J. MARTINEZ,

Appellant,

vs. **CASE NO. 90,952**

STATE OF FLORIDA,

Appellee.

______________________________/

ANSWER BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT
APPLICATION OF §924.051, FLORIDA STATUTES AND PROCEDURAL BAR

Appellant raises nine claims in the instant appeal. Many of these claims were not the subject of an objection below. Both the legislature and this Court have made it clear that a judgment or sentence may be reversed on appeal only when an appellate court determines after a review of the complete record that prejudicial error occurred that was properly preserved in the trial court or, if not properly preserved, would constitute fundamental error. §924.051, Fla. Stat. (Supp. 1996); Pomeranz v. State, 703 So.2d 465, 470 (Fla. 1997). The statute also provides that the party challenging the judgment or order of the trial court has the burden of demonstrating that a prejudicial error occurred in the trial court. See, Amendments to the Florida Rules of Appellate Procedure, 685 So.2d 773 (Fla. 1996).[1]

To counter the procedural bar to some of these issues, Martinez has couched these claims on appeal, in the alternative, in terms of ineffective assistance of counsel in failing to preserve or raise those claims. This Court should decline appellant's

[1] Section 924.051, Florida Statutes (Supp. 1996), which was created by the Criminal Appeal Reform Act of 1996 (ch. 96-248, §4, at 954, Laws of Fla.) applies to this case. §924.051 became effective on July 1, 1996. Doug Lawson and Sherrie-McCoy Ward were killed in October of 1995. Martinez's trial commenced on April 9, 1997 and he was sentenced on May 27, 1997. (T1:21-24, 192, 331-336).

invitation to circumvent the requirement of a contemporaneous objection by reaching the merits of unpreserved claims.

STATEMENT OF THE CASE AND FACTS

Appellant Joaquin Martinez and one of the victims in this case, Douglas Lawson, met in early 1994. (T6:471) Martinez worked at AT&T Atlantic and Lawson made deliveries for another company to AT&T. (T6:471) Martinez and Lawson became friends, and Martinez later obtained a job for Lawson at AT&T. (T6:471) Janice Menendez and Laura Babcock also worked at AT&T at that time. (T6:625; T7:784) Janice knew and sometimes socialized with Martinez and Lawson; Laura knew Martinez and ultimately started dating him, but she only knew Lawson as a co-worker. (T7:725-7; T8:784-5, 794)

Martinez's wife, Sloane, had met Lawson on several occasions. She had been to his workplace to take her husband lunch or his briefcase, and Lawson had sometimes given her husband rides to or from work when the Martinezs' didn't have a car. (T6:471-2; T7:628) She did not know Lawson's last name, and did not recognize him when she later saw flyers offering a reward for information about these murders. (T6:472)

Sloane divorced Martinez in June 1995. (T6:467-8) Martinez rented a small apartment for Sloane and the girls and paid child

support at first. (T6:468-70; T7:584-5) However, in late summer, 1995, Martinez began having financial difficulties due to problems with his export business. (T6:469; T8:770, 786, 804)

In early June 1995, Martinez lived with his girlfriend, Laura Babcock, in an apartment in Indian Rocks Beach. (T8:785) They were going to be moving to another apartment at the end of October. (T8:785-6) On Friday, October 27, Martinez left the apartment, saying he had a few things to take of; he was going to see his brother Ronnie, and to get in touch with a friend, "Michael," that owed Martinez money. (T8:791) Babcock had heard about Michael before, and had been to his house one time, but had not met him. (T8:792)

Sloane met Martinez on October 27 at a grocery store about a block from her apartment. (T6:476) Martinez was wearing a nice-fitting gray shirt and shorts, a belt, socks and sneakers. (T6:476-7) Martinez was always conscientious about his clothes and his appearance. (T6:482; T8:797) They walked back to her apartment; Martinez met her roommate and spent some time with the girls, then the roommate took the girls to the fair as Sloane was going to work that night. (T6:477) They made love. (T6:477-8) Martinez took a shower and left around 4:00 that afternoon. (T6:478) He told her

that he was going to his brother’s, that he had some business to take care of, a big business deal that was going to take him out of debt and make everything better. (T6:478-9)

Sometime between the afternoon of October 27, 1995 and midnight, October 30, 1995, Douglas Lawson and Sherrie McCoy-Ward were killed in their home. (T.5:343, 393; T.7:651-3; 659-60) Sherrie’s sister spoke with her over the phone for about 35 minutes at 12:48 p.m. on Friday, October 27; a one-minute call. (as would be noted if the caller hung up on an answering machine) was made from the Lawson house at 5:01 that afternoon, to Sherrie’s mother’s house. (T7:652-3, 659-61, 666) The medical examiner observed the bodies at the scene around 4:00 a.m. on October 31 and determined that Doug and Sherrie had been dead at least 24 hours, and possibly three or four days or more. (T5:393) Doug had been shot several times, in the back, the shoulder, the neck, and through the hands. (T5:394, 396-404) Sherrie had been shot in the shoulder and stabbed six or seven times in the front neck area, and about fourteen times in the back neck area; she also sustained a number of defensive stab wounds to the hands and forearms. (T5:405-8) She was found slumped in a kneeling position by the front door, near a large glass table with keys and personal items on it. (T5:352,

356-9)

After Martinez left Sloane’s apartment that Friday afternoon, a friend came over and convinced Sloane that she should serve the legal papers on Martinez. (T6:480-1) Around 6:00, she and the friend went out to the store and she had the friend drive by Ronnie’s house. (T.6:481-2) Martinez was standing by his car, both car doors were open, and Ronnie was standing there with a hose in his hand. (T6:481-2) She had the friend drive by again, because she was confused as Martinez was wearing different clothes, and they looked like his brother’s because they were much too big for him. (T6:482) Sloane went home and got the papers to be served, then went to a convenience store and called the sheriff’s office to come serve the papers. (T6:483) Deputy Richard Shannon arrived and served the papers on Martinez at Ronnie’s house at 6:50 p.m.. (T6:484-5; T7:645) When Shannon returned to Ronnie’s house to clarify something a few minutes later, Martinez had left. (T6:486; T7:645-6) According to Det. Conigliaro, Sloane’s apartment was about five miles from the victims’ house and less than a mile from Ronnie’s; it was about three and a half to four miles from the victims’ house to Ronnie’s house. (T7:605)

Eden Dominick, a friend of Laura Babcock’s, testified that

Martinez arrived at her apartment around 8:00 p.m. on October 27. (T8:771) Dominick was getting ready for a big Halloween party she was having the following night. (T8:770-1) Martinez was very upset and out of sorts, he looked like he had been in a fight. (T8:772) He sat on the couch, watching TV, and did not want dinner. (T8:772) He wanted to leave a briefcase with her, but she wouldn't let him since she didn't know what was in it. (T8:774) He said he was intoxicated and asked Eden's husband to drive him home; Eden did not think Martinez seemed intoxicated and did not recall him drinking while he was at her apartment. (T8:773) Her husband drove him to the apartment he shared with Laura around 11:00 p.m.. (T8:772)

Martinez got back to the apartment he shared with Laura Babcock between 11:00 p.m. and midnight that night. (T8:797) He was dressed in clothes that looked like they belonged to his brother and he had a swollen lip and scraped knuckles. (T8:797-8)

On Saturday, October 28, Martinez asked Sloane's stepsister Leah how he could heal his hand quickly. (T8:800-1)

Martinez called Sloane at her work sometime that Saturday or Sunday. (T6:487-8) He sounded very scared and told her he was safe with a friend, implying he was in Tallahassee. (T6:478-8) On

November 2, Martinez showed back up at Sloane's apartment. (T6:487-8) His hair was lighter, styled differently, and he had started a goatee and started wearing glasses. (T6:490) On Thanksgiving Day, he was looking for cleaning supplies and washed his car. (T6:490-1) Prior to this, Martinez had told her that he had done something very bad, he had crossed the line, he had killed a friend and was very afraid. (T6:491) He said the only thing that would link him to it was the car. (T6:491) When she asked him whom he had killed, he told her not to worry about it, that the guy was a nobody, a drug dealer, scum and that it wasn't supposed to go that way. (T6:491) She did not want to believe him and helped him clean his car; she noticed a couple of small brown stains on the passenger side in the front. (T6:491-2) Martinez stripped and cleaned the car completely; he said he was in danger and couldn't hang out there much longer. (T6:492-3) He would park backwards so people could not see his car tag. (T.6:493) After that, if she brought the subject up, he would get upset and tell her not to talk about it. (T6:494)

A few days after Thanksgiving, he told her that he wasn't safe there anymore, and said he was moving in with a friend named Tommy. (T6:495-6) He had been seeing Laura again during November, but had

told Laura that he was living with a friend named Kevin in another part of town. (T8:811) In early December, Laura moved into an apartment, and Martinez moved in with her; he lived there until the time of his arrest in January 1996. (T8:811) However, he spoke with Sloane nearly every day between then and Christmas, telling her that he was not safe, that he wanted to take her and the girls to Miami, get passports, and move to Spain. (T6:496) He went to Sloane's on Christmas, made love to her, and opened presents with the girls. (T.6:497) He left because he wanted to go to church for confession with Tommy. (T6:498) He called a lot, rambling about the pressure he was under and sounding desperate and scared. (T6:498-9) One night he called Sloane very late, crying and telling her that he had a nightmare, talking about all the blood, saying he couldn't take it anymore. (T6:499) Around January 14, 1996, he and Sloane had taken the girls to K-Mart to have pictures made; on the way out, Sloane noticed a flyer about the murders and started to read it, but Martinez told her it was trash, and put his hand over it so she couldn't see it. (T6:499-500)

On January 27, 1996, Sloane called an old friend, Janice Menendez, that used to work with Martinez at AT&T. (T6:506; T7:625, 628) Janice asked Sloane if she had heard about Doug. (T6:506-7;

T7:628-9) Sloane was not sure what Janice was talking about at first, and Janice described Doug and said that he and his girlfriend Sherrie had been murdered. (T6:507; T7:629) Janice testified that Sloane "freaked out" at that point, repeating "oh my God, Joe did it". (T7:630) Sloane was very upset and they hung up shortly after that, with Sloane planning to call the authorities. (T7:630-1) Sloane talked to her sister, and her sister encouraged her to do the right thing; she told Sloane that if Sloane didn't call the police, she would, and that Sloane might be charged and lose her daughters. (T6:508-9)

Sloane called the police and several deputies and detectives arrived. (T6:510) Martinez called her several times that day; Det. Conigliaro listened to one conversation where Sloane told Martinez that she knew he had killed Doug Lawson, and Martinez told her not to say things like that on open phones. (T6:511; T7:588) Sloane asked Martinez why a homicide detective would be calling his pager, and Martinez told her that, as he had explained before, he could get the death penalty for what he'd done. (T6:513; T7:587-8) Martinez was upset that she had returned the detective's page, and told her angrily that she didn't understand, it wasn't an accident. (T6:512; T7:589) Sloane and Martinez agreed that Martinez would

come to Sloane's apartment the next day. (T6:513; T7:590)

The next day, January 28, with Sloane's consent, the sheriff's office installed equipment to monitor and record Martinez's visit. (T6:514; T7:591) A decision was made to leave Sloane and Martinez's young daughters in the apartment to keep Martinez from being suspicious, as part of the reason he was coming was to see them. (T6:516; T7:593) However, the children were screaming and crying most of the time, and as a result the audio tape is very difficult to hear. (T6:518; T7:593) Sloane and Det. Conigliaro later reviewed the tapes and prepared a transcript of the conversation based on what they heard on the tape. (T6:523-6; T7:602)

On the tape, Martinez repeatedly asks Sloane whom she has talked to about this. (T6:529, 546) Martinez says that Lawson was a big drug dealer. (T6:530-1) When she asked why this happened, if Martinez was on drugs or drunk, he talks about Lawson knowing about the deal, and wanting to trade out and change everything in the middle of the deal. (T6:532, 547, 552) Martinez says that Lawson had threatened him, was going to hurt him physically. (T6:548) He tried to get her to agree to be his alibi, telling her she needed to say he was with her the day of the murders, October 27, until

6:00 or 6:30. (T6:538, 551-3) They argue about this because she tells him she will not jeopardize her children. (T6:540, 543, 553) She encourages him to call the police and tell the truth, telling him they had a witness. (T6:541, 550) He tells her, "I'm the one that did this shit." (T6:541) He asks to see her camcorder, and checks it to make sure she is not recording their conversation. (T6:545, 554) He told her that he was going to leave town, and he left, saying he loved her, he was sorry, and he would call. (T6:545, 554-5)

As he got out to the street, the sheriff's officers arrested him and impounded his car. (T7:597) There were thirteen areas in the car that presumptively tested positive for blood using Luminal tests; three of these areas were confirmed with more specific Hemastix testing. (T7:618, 620) However, when presumptively tested with Phenolphthalein, these areas tested negative. (T9:850-1) Phenolphthalein is more selective than Luminal or Hemastix about detecting only blood and excluding other "false positives," but it requires more blood to be present in order to detect the blood; the use of Luminal will also dilute the blood sample. (T9:850-855) Therefore, it is possible for blood to react positively to Luminal and negatively to Phenolphthalein. (T9:854)

Shortly after Martinez’s arrest, Laura Babcock was following the news stories, trying to figure out what had happened. (T8:793) She saw a picture of Lawson’s house on TV, and recognized it as the house they had gone to when Martinez went to see his friend “Michael” one time. (T8:794) She spoke with him over the phone at one point, telling him that she had put some things together and had a lot of questions, and he told her that once everything was over he would sit down and explain it all to her. (T8:805) She told him that she had figured out that Michael was Doug Lawson, and he told her to be quiet, don’t talk about it over the phone, he would talk to her about it later. (T8:805)

While Martinez was in jail awaiting trial, he sometimes hung around with inmates Mark Richey and David Setner. (T8:682) One time they were talking about Martinez’s case, and Richey asked Martinez outright if he had done it. (T8:683) Martinez said yes and Setner told Martinez to be quiet, he shouldn’t discuss it. (T8:683) Another inmate, Neil Ebling, testified that Martinez told him about committing these murders. (T8:690)

Two other inmates, Larry Merritt and Gerrard Jones testified about a scheme which was concocted by Martinez to implicate another individual in these murders in order to assist the defense in

creating reasonable doubt as to Martinez's guilt. (T8:728) Martinez approached Jones and asked Jones to coach Merritt on the facts of the crime so that Merritt could claim that a man named Ali Bisset had admitted committing the murders. (T8:702-6, 726-8) Merritt and Jones were both initially to be defense witnesses, however, they changed their minds and contacted the State independently after deciding to tell the truth. (T8:704, 708, 710-1, 731-2)

In accordance with the plan, Martinez described the facts of the crime to Jones, Jones wrote out the facts and gave the written notes to Martinez, who gave them to Merritt to study and learn. (T8:708, 726, 729-30) Jones also wrote out an affidavit, which Merritt signed, consistent with the defense story; Merritt also gave a fabricated deposition for the defense. (T8:705-6, 708, 729) Merritt was to recount that Bisset knew the victims and had a crush on Sherrie. (T8:727) It was supposed to have been a drug deal that went bad, and Doug got shot multiple times with a 9mm gun, Sherrie freaked out, started screaming, and was shot but didn't die, so Bisset took out a knife and stabbed her repeatedly. (T8:727) However, at the deposition, Merritt made mistakes in describing the victims' house; Jones and Martinez were angry, but continued

working with Merritt to try to fix it. (T8:707, 730)

For his assistance, Merritt was promised legal help with his appeal; Jones was to be paid $400 by Martinez's family. (T8:704, 732-4) Some of the written notes used to coach Merritt and information about a Western Union money transfer from Martinez's father to Jones' sister were admitted into evidence. (T8:729, 732-4, T14:47-54, 116-127) One of the written notes had Martinez's fingerprint on it. (T8:759)

Another inmate, Kevin Hall, testified that he had been approached by Gerrard Jones to lie in order to help Martinez. (T9:828-8) He went to make a sworn statement but couldn't go through with it, so he told the truth instead. (T9:828-30) Martinez never admitted committing these murders to Hall, but Martinez told Hall that he should never have told his wife that he killed some people. (T9:832-3)

Martinez was convicted as charged. (T2:225-7; T10:1052) The State presented no witnesses in the penalty phase but relied on the guilt phase evidence to establish the aggravating factors. (T11:1071) The defense presented two jail officials to testify that Martinez was a good prisoner. (T11:1071-2, 1085-89); Martinez's mother, Laura Babcock, and Sloane Martinez to testify

that Martinez was a kind person and good family man. (T11:1078-83, 1093-97, 1100-1109); and Dr. Michael Gamache to testify that Martinez suffered no mental illness or dysfunction and would do well in prison. (T11:1110-36)

The jury recommended a life sentence for Lawson's murder and, by a vote of nine to three, recommended a death sentence for the murder of Sherrie McCoy-Ward. (T11:1192) The judge imposed a sentence consistent with these recommendations, finding three aggravating factors. (prior violent felony conviction; during commission of burglary, and heinous, atrocious, or cruel) and statutory mitigating factors of no significant criminal history and family background, as well as some nonstatutory factors related to Martinez's car accident, work history, aversion to violence, prison adjustment, family ties, and above average intelligence. (T2:331-36) This appeal follows.

SUMMARY OF THE ARGUMENT

Appellant's first claim is a cumulative error claim. This cumulative error claim is not an independent claim, but is contingent upon the appellant demonstrating error in at least two of the other claims presented. Although this may be a legitimate claim on the facts of a particular case, such facts are not present herein, as no errors have been shown.

Appellant also urges that the use of the transcript by the jury as an aid to understanding was error because the transcript contained significant incriminating remarks which were not audible on the tape. It is the state's position that the tape and transcript were properly admitted. Furthermore, as Sloane, Martinez and Det. Conigliaro were present for the conversation and, therefore, competent to testify as to appellant's admissions of guilt without consideration of the tape or transcript, error, if any, in allowing the jurors to view to the transcript prepared by the witnesses was harmless.

Appellant's third claim is that the prosecutor violated his right to a fair trial by making improper remarks during the trial and closing arguments. Appellant's challenge to the prosecutor's comments is procedurally barred, as none of the comments made

during closing argument, which are now asserted as a basis for error by appellant, were the subject of a specific contemporaneous objection presented to the court below. As for the challenge to evidence brought out by the state during the presentation of its case, the admission of such evidence is within the control of the trial court, is not an abuse of discretion and does not constitute prosecutorial misconduct.

Appellant's conviction for burglary is supported by competent substantial evidence that consent to enter or remain was withdrawn during the brutal double homicide in the victim's home.

Next appellant speculates that because two witnesses changed their testimony immediately prior to trial that a discovery violation occurred. Not only does the record not support this claim, but this Court has made it clear that changed testimony at the time of trial does not support an allegation of a discovery violation.

Appellant also raises a claim of ineffective assistance of counsel. Although he acknowledges that ineffective assistance of counsel generally is not cognizable on direct appeal, he contends that this case presents unique circumstances warranting reversal because of counsel's deficient performance. It is the state's

position that this claim is not only meritless, but, more importantly, is not properly before this Court and, should be denied.

Appellant also challenges the constitutionality of Florida’s capital sentencing statute. As appellant acknowledges, this Court has repeatedly rejected similar challenges to Florida’s capital sentencing statute.

Appellant next alleges that his sentencing process was encumbered by errors regarding the inappropriate application of two aggravating circumstances; 1) during the course of a burglary and, 2) heinous, atrocious or cruel. It is the state’s position that the trial court properly found both aggravators, that the sentence was properly imposed and that error, if any, was harmless.

Finally, Appellant contends that his sentence is disproportionate and should be reduced to life. It is the state’s contention that given the aggravated facts of this case balanced against the insignificant mitigating evidence presented herein, and when those facts are compared to similar cases, the trial court properly sentenced appellant to death.

ARGUMENT

ISSUE I

WHETHER APPELLANT'S ALLEGATION OF CUMULATIVE ERROR INCLUDING DISCOVERY VIOLATIONS, PROSECUTORIAL MISCONDUCT, INEFFECTIVE LAWYERING AND INCOMPLETE LEGAL INSTRUCTIONS FUNDAMENTALLY FLAWED HIS TRIAL AND VITIATED THE RELIABILITY OF THE PROCEEDINGS IN VIOLATION OF THE FLORIDA CONSTITUTION, ARTICLE 1, SECTION 9, AND THE UNITED STATES CONSTITUTION, AMENDMENTS V, VI AND XIV.

Appellant's first claim is that cumulative error, including discovery violations, prosecutorial misconduct, ineffective lawyering and incomplete legal instructions fundamentally flawed his trial and vitiated the reliability of the proceedings in violation of the Florida Constitution, Article 1, Section 9, and the United States Constitution, Amendments V, VI and XIV.[2]

This cumulative error claim is not an independent claim, but is contingent upon the appellant demonstrating error in at least two of the other claims presented. Although this may be a

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[2] The amicus brief filed on behalf on Martinez also asserts a violation of international law based on essentially the same claims of error as presented by appellant. The violation of international law claims, as presented in the amicus brief, are procedurally barred as they were not presented to the court below. Breard v. Greene, 118 S.Ct. 1352, 1354-55 (1998). (Although treaties are recognized by our Constitution as the supreme law of the land, that status is no less true of provisions of the Constitution itself, to which rules of procedural default apply.)

legitimate claim on the facts of a particular case, such facts are not present herein. Melendez v. State, 718 So.2d 746 (Fla. 1998); Johnson v. Singletary, 695 So.2d 263 (Fla. 1996) Most of the claims urged in support of appellant's cumulative error claim have also been asserted by appellant as individual claims for relief.[3] Therefore, the state will rely on the arguments presented infra in opposition to those claims.

The only claim raised herein that has not been raised as an independent claim is his assertion that the trial court had a duty to deliver the alibi instruction sua sponte. Appellant concedes, however, that no Florida court has held that a trial judge has a duty to give an alibi instruction when it has not been requested by the defense. Moreover, the two out of state cases, Gardner v. State, 397 A.2d. 1372 (Del. 1979) and Commonwealth v. Roxberry, 553 A.2d. 986 (Pa. 1992), upon which appellant relies, are readily distinguishable from the instant case.

First, Roxberry was a collateral case, wherein the court reviewed Roxberry's claim that counsel was ineffective for failing to advise the prosecution that he intended to present an alibi

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[3] Prosecutorial error-Issue II, discovery violations-Issue V; ineffective assistance of counsel-Issue VI.

defense and failed to request an alibi instruction after an evidentiary hearing. The court found no error in counsel's failure to provide written notice because it did not result in the exclusion of alibi evidence. Id. at 988. As for the failure to request an alibi instruction, the court noted that at the evidentiary hearing on the ineffective assistance of counsel claim, defense counsel's explanation for the failure to request the instruction was that he probably had failed to request the instruction because the disinterested alibi witness had failed to appear. The court found counsel's explanation to be unreasonable and determined that Roxberry was prejudiced by the failure to give the instruction.

Nowhere in the Roxberry opinion does it suggest that the trial judge had a duty to give the instruction sua sponte. To the contrary, the court noted that to obtain relief based on a claim of judicial error, the claim must have been preserved. Id. at 991. As Martinez's claim was not presented to the court below, it is barred.[4]

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[4] In the instant case, as this is a direct appeal and this claim was not presented to the court below, the record is silent as to defense counsel's reasons for not requesting the instruction. Absent such evidence, appellant is, nevertheless, urging this Court to speculate as to the reason behind counsel's decision. This Court has consistently held that it will not render decisions based

Garnder, on the other hand, was a direct appeal case. However, relief was *denied* based on Gardner's claim that the trial judge had duty to instruct the jury sua sponte on his alibi defense. The Garnder court held:

> In the instant case, there was insufficient evidence to require the Trial Judge, Sua sponte to charge on alibi. Because the evidence demonstrates that the victim was beaten around midnight, an alibi defense would show that the defendant was not in the apartment at midnight. This crucial testimony is not in the record; the testimony that defendant contends corroborates his alibi only accounts for his presence elsewhere from 12:35 a. m. to 12:45 a. m. Instead of placing the defendant so far away from the scene of the crime that his participation would have been impossible, this testimony placed defendant near the scene of the crime 35-45 minutes after it occurred, and left his presence unaccounted for during the time when the crime was committed. *Because the defendant failed to establish an alibi defense by sufficient evidence, the failure of the Court to deliver an alibi instruction Sua sponte could not be plain error*.
>
> Contrary to defendant's contentions, Rogers v. Redman, D.Del., 457 F.Supp. 929. (1978) does not support his position. Unlike Rogers, this defendant did not produce evidence to show that he was not at the scene of the crime at the crucial time in question. Also, whereas

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on mere speculation. Donaldson v. State, 722 So.2d 177, 187 (Fla. 1998); Knight v. State, 721 So.2d 287, 298 (Fla. 1998); Gamble v. State, 659 So.2d 242, 245 (Fla.), cert. denied, 516 U.S. 1122 (1995); Gordon v. State, 704 So.2d 107, 117 (Fla. 1997); Hoskins v. State, 702 So.2d 202 (Fla. 1997)

> the issue in Rogers was a misstatement of the law of alibi in the jury instructions, the instant case concerns an omission of an alibi instruction; and the standard for omitted instructions is less rigorous than for misleading instructions. See Rogers v. Redman, D.Del., 457 F.Supp. 929, 931. (1978); Henderson v. Kibbe, 431 U.S. 145, 155, 97 S.Ct. 1730, 1737, 52 L.Ed.2d 203. (1977) Finally, while the defendant in Rogers objected to the court's alibi instructions, the *defendant here did not request an alibi instruction or object to the court's failure to instruct the jury on alibi*.

Id. at 1373-74(emphasis added)

Martinez, like Garnder, simply failed to establish any alibi defense that would render the absence of an instruction for the defense fundamental error. There is nothing in this record that mandates a finding that counsel was ineffective or that the trial judge had a duty to sua sponte deliver an alibi instruction.

In Shells v. State, 642 So.2d 1140, 1141 (Fla. 4DCA 1994), rev. denied, 651 So.2d 1196 (Fla. 1995), the Fourth District rejected Shells' assertion that the trial court should have sua sponte given a jury instruction on self-defense and that the failure to do so constituted fundamental error. The court noted that at trial, defense counsel's only theory of defense was that conflicts in the testimony would lead to a reasonable doubt of the defendant's guilt and that Shells' defense attorney did not argue self-defense, did not request a self-defense instruction, and did

not object to the instructions given to the jury. The court concluded that under the facts of the case, the trial court's failure to give a self-defense instruction did not constitute fundamental error. The court further noted that to find fundamental error in this case would place an unrealistic burden on the trial judge concerning trial tactics and strategy that should be left to defense counsel. Shells, at 1141, citing State v. Smith, 573 So.2d 306, 310 (Fla. 1990)

Furthermore, contrary to appellant’s assertion, defense counsel’s argument to the jury did not suggest that he was relying on an alibi defense. In fact, in closing argument, defense counsel never used the word alibi. Rather, in closing argument the defense in Martinez, *like the defense in Garnder and Shells*, focused on the existence of reasonable doubt, lack of evidence and conflicts in evidence. (T10:976-988) Counsel suggested to the jury that Martinez’s videotaped admissions of guilt should not be relied upon because it was inconsistent with the evidence. (T10:977-78) He also urged that neither Sloane nor Babcock can be believed, that they both had motives to lie and that the timing of their statements was suspect. (T10:977-79) Although, counsel briefly accounted for Martinez’s whereabouts during that weekend, counsel never identified where Martinez was at time of death. (T10:981-83)

Whether this was a result of the fact that the exact time of death was unknown or because counsel was hampered by evidence that Martinez had asked Sloane to provide an alibi for him, the fact remains that alibi was not Martinez's "main or sole defense." Thus, even if the dicta in Gardner,[5] was binding, appellant has failed to reach that threshold required by Garnder.

Additionally, appellant refers to his claim of prosecutorial misconduct in connection with changing the time of the crime. While this claim is also addressed in Issue V, wherein appellant alleges certain discovery violations, it warrants further discussion herein. The indictment alleged that the murders were committed between October 27 and October 31. (T1:45-47) After appellant's arrest, but before the indictment was filed, defense counsel moved for a bill of particulars. (T1:28) The motion was not renewed after the indictment was issued and apparently a bill of particulars was never filed. The state did file a Demand for

[5] In Gardner, the court noted that although there is generally no duty to charge upon alibi in the absence of a specific request, in certain circumstances, (e. g., where alibi is the defendant's main or sole defense, the proffered evidence against the defendant is all or mostly circumstantial, the possible punishment is severe, or where a case is so complex that an instruction is necessary in the interests of justice) a duty to instruct the jury upon alibi may arise, so that the failure to do so would amount to a manifest defect affecting the defendant's substantial rights and thus constitute plain error.

Notice of Alibi which requested any alibis for after midnight on October 28. As appellant concedes, the time of death was difficult to establish due to the decompensation of the victim's bodies and was based on circumstantial evidence. The fact that the evidence by the time of trial suggested that the crime was actually committed on October 27, does not suggest any prosecutorial misconduct, but, rather, is the result of continuing investigations and clarification of known witnesses' testimony. As October 27, was included on the indictment, appellant was on notice from the outset that his whereabouts on this date would be at issue. Further, contrary to appellant's contention, there is no evidence that defense counsel was not aware of this information at the time of trial or that he was in anyway prejudiced by it. Taylor v. State, 444 So.2d 931, 934 (Fla. 1983); Gitman v. State, 482 So.2d 367, 372 (Fla. App. 4 Dist. 1985). Martinez's only assertions regarding how his trial strategy would have been different had he known about the changed testimony regarding the time of the crime is that he might have realized the implausibility of acquittal and accepted a plea offer from the state. Not only is this an insufficient showing of prejudice, Pomeranz v. State, 703 So.2d 465, 468-69 (Fla. 1997), but, essentially, is a concession that given the weight of the state's evidence against him conviction was

likely. Given this concession, appellant's claim of harmful error herein and with regard to each of the other claims is puzzling and should be rejected. Compare, Gordon v. State, 704 So.2d 107, 113 (Fla. 1997) (finding that Gordon's admission in his brief that even alleged statement that 'the doctor didn't want to give up the piece of paper,' is entirely consistent with a burglary or robbery, as opposed to a murder," was a concession, as the circumstantial evidence indicated, that he was inside the apartment to, at least, perpetrate a robbery.) Moreover, given this concession, appellant's demand for a new trial would seem to be a waste of judicial resources. The testimony of Laura Babcock, Eden Dominick and Tina Jones would unquestionably be admissible at a new trial. Thus, if acquittal is implausible in light of this evidence, a new trial would again result in conviction.

Because none of the allegations demonstrate any error, individually or collectively, no relief is warranted and this claim should be rejected. Melendez v. State, 718 So.2d 746 (Fla. 1998); Johnson v. Singletary, 695 So.2d 263 (Fla. 1996)

ISSUE II

WHETHER THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTION TO USE A TRANSCRIPTION OF AUDIO-VIDEO TAPES OF THE DEFENDANT'S ADMISSIONS TO HIS EX-WIFE SLOANE.

Sloane Martinez testified that on January 27, 1996 while speaking with an old friend, Janice Menendez, she learned about the murders. Janice described Doug and said that he and his girlfriend Sherrie had been murdered. (T6:507; T7:629) Sloane "freaked out" at that point, repeating "oh my God, Joe did it." (T7:630) Sloane called the police and several deputies and detectives arrived. (T6:510) Martinez called her several times that day; Det. Conigliaro listened to one conversation where Sloane told Martinez that she knew he had killed Doug Lawson, and Martinez told her not to say things like that on open phones. (T6:511; T7:588) Sloane asked Martinez why a homicide detective would be calling his pager, and Martinez told her that, as he had explained before, he could get the death penalty for what he'd done. (T6:513; T7:587-8) Martinez was upset that she had returned the detective's page, and told her angrily that she didn't understand, it wasn't an accident. (T6:512; T7:589) Sloane and Martinez agreed that Martinez would come to Sloane's apartment the next day. (T6:513; T7:590)

The next day, January 28, with Sloane's consent, the sheriff's office installed equipment to monitor and record Martinez's visit. (T6:514; T7:591) Det. Conigliaro, Corporal Baker and Assistant State Attorney Karen Cox were in the surveillance van, listening to the conversation. Det. Conigliaro testified that they had decided

to leave Sloane and Martinez's young daughters in the apartment to keep Martinez from being suspicious. (T6:516; T7:593) However, the children were screaming and crying most of the time, and as a result the audio tape is difficult to hear. (T6:518; T7:593) Sloane and Det. Conigliaro later reviewed the tapes and prepared a transcript of the conversation. (T6:523-6; T7:602)

The video tape was introduced as State's Exhibit 24. Sloane identified it as a true and accurate representation of what occurred in her apartment with the defendant on January 28, 1996. (T6:518) Defense counsel objected to the admission of the tape, asserting that Martinez had a reasonable expectation of privacy in the premises. This objection was overruled. (T6:519-20) The record then reflects the following discussion concerning the audibility of the tape:

> MR. COX: Just so you have a quick history, Judge, Mr. Fox did a motion to exclude the transcript created by Ms. Martinez, and at the time Detective Conigliaro -- Judge Fleischer heard that -- had copies of the tape, had the transcript and ruled it would be admissible, not as evidence but only for the purpose of the jury having while the tape is being played.
>
> It's not going to go back in the jury room is what she ruled. I would suggest as far as the court reporter, Judge, my suggestion would be if we ask her to take down something off this tape, quite candidly, she might take down three words. This thing is really difficult to hear.

> The only way my witnesses were able to go back and do it was putting their ear up against it and rewinding and all of that. I would suggest that maybe we have the transcript put in the record as what -- you know, as far as what can be taken down to some extent.
>
> I'm not asking that the defense stipulate that the contents are necessarily true. But that's about as much as anybody could make out working with this tape. So I would suggest maybe having the transcript and the tape, we would suggest putting the tape and the transcript in for appellate purposes.
>
> THE COURT: The tape is in.
>
> MR. COX: The tape is in.
>
> MR. FRASER: Well --
>
> MR. FOX: As long as it's clear that we're not waving [sic] our previous objection to the transcript's accuracy, I have no problem with that.

(T4:520-522)

Sloane then described how she and Det. Conigliaro, who had both heard the conversation as it was going on, prepared the transcript. She said that they sat in quiet room, put the tape in a VCR, put their ears against it and rewound, stop, rewound, for several days. She testified that although in creating the transcript she was able to recall at the time the events as they were occurring on January 28, the transcript only included that which she could actually make out from the tape. (T6:523-25) The transcripts were then given to the jury and the video was played. (T6:527) Both the transcript of the tape and the court reporter's

rendition are included in the record. (T6:528-46)

On the tape, Martinez repeatedly asks Sloane whom she has talked to about this. (T6:529, 546) Martinez says that Lawson was a big drug dealer. (T6:530-31) When she asked why this happened, if Martinez was on drugs or drunk, he talks about Lawson knowing about the deal, and wanting to trade out and change everything in the middle of the deal. (T6:532, 547, 552) Martinez says that Lawson had threatened him, was going to hurt him physically. (T6:548) He tried to get her to agree to be his alibi, telling her she needed to say he was with her the day of the murders, October 27, until 6:00 or 6:30. (T6:538, 551-3) He tells her, "I'm the one that did this shit." (T6:541) He told her that he was going to leave town, and he left, saying he loved her, he was sorry, and he would call. (T6:545, 554-5)

Now on appeal, appellant urges that the use of the transcript by the jury as an aid to understanding was error because the transcript contained significant incriminating remarks which were not audible in the tape. He also contends that this error was compounded because the jury was not given an instruction that the words on the transcript were not to be considered unless also heard on the tape. It is the state's position that appellant has failed to show harmful reversible error and, therefore, is not entitled to

relief. §924.051 Fla. Stat. (1996).

First it should be noted that as both Sloane and Det. Conigliaro were present for the conversation and, therefore, competent to testify as to appellant's admissions of guilt without consideration of the tape or transcript,[6] error, if any, in allowing the jurors to view to the transcript prepared by the witnesses was harmless. In Odom v. State 403 So.2d 936, 941 (Fla. 1981), cert. denied, 456 U.S. 925 (1982), this Court rejected Odom's claim of reversible error where this Court found that even though admission of a tape recording was improper that the error was harmless where one of the parties on the tape testified to its contents. This Court stated in pertinent part:

> . . . Gerald Jones, in cooperation with police, wore a hidden transmitter and engaged Odom in a conversation in which he made incriminating statements which the police recorded. The recording was admitted in evidence and Jones testified about the contents of the recorded conversation.
>
> * * *
>
> . . . Having heard the appellant voluntarily make statements of an incriminating nature concerning his participation in the crime, Jones clearly could have testified from memory about the content of the statements. The Fourth Amendment does not protect a person from the possibility that one in whom he confides will violate the confidence. Hoffa

[6] Det. Conigliaro testified that he could hear conversation much better live than on the tape. (T7:596)

> v. United States, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966). If this is so, then there is no bar under the United States Constitution to the introduction of more reliable and perhaps more credible evidence recordings made by the informer or agent to whom the statements are made. United States v. Caceres, 440 U.S. 741, 99 S.Ct. 1465, 59 L.Ed.2d 733 (1979); United States v. White, 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1971); Lopez v. United States, 373 U.S. 427, 83 S.Ct. 1381, 10 L.Ed.2d 462 (1963).
>
> The evidence, therefore, should have been excluded. The admission of the tape into evidence, however, does not require reversal of the judgment. There was other evidence of appellant's guilt sufficient to support the jury's verdict. The improperly obtained evidence was merely cumulative. The error of allowing such evidence to go to the jury was harmless.

Odom v. State, 403 So.2d 936, 940 (Fla.1981), cert. denied, 456 U.S. 925 (1982)

As appellant's only objection to the evidence presented to the jury derived from the conversation between Sloane and Martinez was that the use of the transcript as an aid to understanding was improper and there is no suggestion that the tape or the witnesses' testimony was inadmissible, appellant has clearly failed to show any reversible error. See, Odom v. State, 403 So.2d 936, 940 (Fla. 1981), cert. denied, 456 U.S. 925 (1982); Daniels v. State, 634 So.2d 187 (Fla. App. 3 Dist. 1994)

Furthermore, with regard to appellant's claim that the use of

the transcript was improper, this Court made it clear in Hill v. State, 549 So.2d 179 (Fla. 1989), that it is appropriate to allow the jury to use a transcript of a defendant's taped statements as an aid in understanding a tape when it's played to the jury. Upon denying relief, this Court reaffirmed the holding in Golden v. State, 429 So.2d 45 (Fla. 1st DCA), review denied, 431 So.2d 988 (Fla. 1983), and held that it is not reversible error to use a transcript as an aid to understanding where there is no suggestion that the transcript conflicted with or added information to the tape itself, the transcript was not carried into the jury room and there is no suggestion it became the focal point of inquiry. Id. at 182. In Golden v. State, 429 So.2d 45 (Fla. 1st DCA), review denied, 431 So.2d 988 (Fla. 1983), the First District held that there is no requirement that the jury must be left to contend with authentic tape recordings that are difficult to understand without the sense of sight or some other aid to understanding.

Nevertheless, appellant urges that Hill is distinguishable from the instant case and that reversal is mandated. He contends, unlike Hill, that the accuracy of the transcript was challenged, the transcript was more "than an aid to understanding," the transcript added information to the tape itself and, finally, that the transcript became the focal point of the trial. While it is

true that defense counsel objected to the transcript’s accuracy, nothing in this record or in the initial brief of appellant supports the claim that the transcript was inaccurate or that anything was added to the transcript that was not on the tape. The only challenge raised in the initial brief of appellant is that passages are included in the transcript that were not picked up by the court reporter. Sloane and Det. Conigliaro both testified that they prepared the transcript after repeatedly listening to the tape and that the transcript was a reproduction of what they heard on the tape. Det. Conigliaro testified that they were extremely conservative. If they didn’t hear something, it would be put down as inaudible. (T7:610-11) “[W]hile the court reporter is obligated to make a good faith effort to report a tape when played to the jury and later transcribe it, this does not mean that the court reporter's transcription constitutes evidence of a tape's contents, or that the court reporter's inability to report a tape constitutes evidence regarding the tape's audibility. Rather, the tape, itself, remains the best evidence of its audibility and contents.” Lawrence v. State, 632 So.2d 1099, 1100 (Fla. 1DCA 1994).

As the transcript was not entered into evidence, was not given to the jury during deliberations but only during the playing of the

tape and as the content of the transcript was available through the testimony of both Det. Conigliaro and Sloane, the transcript did not become a focal point of the trial.

Next appellant asserts that the transcript was not properly authenticated at trial. This claim is procedurally barred. Although counsel filed a pretrial motion to authenticate, the motion was denied and was not renewed at trial. (T8:1295; T4:520-523) The failure to renew the objection waives it for purposes of appeal. Pomeranz v. State, 703 So.2d 465, 470 (Fla. 1997) (defendant procedurally barred from challenging admission of collateral crime evidence showing despite pre-trial motion in limine where defendant failed to renew objection during trial.)

Furthermore, appellant concedes that Det. Conigliaro and Sloane authenticated the transcript prior to trial and that Sloane again verified the document at trial. Nevertheless, he contends that since the initial draft was prepared by the prosecutor that neither party could authenticate the document. This argument is baseless in law and fact.

In Grimes v. State, 244 So.2d 130, 134-35 (Fla. 1971), the trial court permitted an unadmitted transcript of a tape-recorded statement to be published to the jury after the officer who took the statement testified that he had reviewed the recording and that

the transcript accurately reproduced the contents of the recording. This Court explained that the transcript had been properly authenticated by the officer's testimony. "[The officer] was present when the recorded statement was taken and, in fact, took the recorded statement. In other words, as in the instant case, the transcription was properly authenticated by the person who took the statement and who verified that the transcript was the same evidence as the recording." Id. at 135. This language suggests that the testimony of the transcriber himself is not essential as long as the one who verified the transcript's accuracy testified that it was an accurate representation of the tape’s contents. Macht v. State, 642 So.2d 1137, 1139 n.1 (Fla. App. 4 Dist. 1994) (no merit to contention that "proper authentication" requires the testimony of the individual who actually prepared the transcript or of an expert to testify that the transcript was accurate where officer who made tape verified authenticity) See, also, Harris v. State, 619 So.2d 340, 343 (Fla. 1st DCA 1993) (authentication satisfied by one with personal knowledge of contents of tape recording.) Thus, in the instant case, where both Sloane and Det. Conigliaro testified that the transcript was accurate and that it was the result of their analyzing the tape and reproducing its contents as an aid to understanding, appellant has failed to show

any error.

Finally, appellant complains that the jury was not given an instruction that the words on the transcript were not to be considered unless also heard on the tape. Although he concedes that no request for an instruction was made nor was an objection raised to the instruction that was given the jury, he urges that this is fundamental error. Appellant also attempts to circumvent the contemporaneous objection rule by urging that counsel was ineffective for failing to make this request.

This Court has made it clear that jury instructions are subject to the contemporaneous objection rule, and absent an objection at trial, can be raised on appeal only if fundamental error occurred. In this context, this Court has defined fundamental error as "error which reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Considering that this instruction is not mandated by the standard jury instructions nor by any prior precedent, the failure to give the special instruction does not constitute either fundamental error or ineffective assistance of counsel. Lawrence v. State, 691 So.2d 1068, 1072 (Fla. 1997) and State v. Wilson, 686 So.2d 569, 570-71 (Fla. 1996)(failure to define reasonable doubt to the jury

in the sentencing phase of a capital trial is not fundamental error.) Accordingly, this claim should also be denied.

ISSUE III

WHETHER PROSECUTORIAL STATEMENTS OR THE USE OF ALLEGEDLY GRUESOME PHOTOGRAPHS REQUIRES A NEW TRIAL.

Appellant's third claim is that the prosecutor violated his right to a fair trial by making improper remarks during the trial and closing arguments. He also challenges the prosecutor's introduction of allegedly gruesome photographs. It is the state's position that no harmful reversible error has been shown and, therefore Martinez is not entitled to any relief on this claim. §924.051 Fla. Stat.

Initially, it should be noted that appellant's challenge to the prosecutor's comments is procedurally barred, as none of the comments made during closing argument, which are now asserted as a basis for error by appellant, were the subject of a specific contemporaneous objection presented to the court below. (T10:1002, 1012-13) This Court has long held that absent a showing of fundamental error, the failure to object to an alleged improper comment bars review. *See* Castor v. State, 365 So.2d 701, 703 (Fla. 1978). The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct

it at an early stage of the proceedings. This Court in the past has not hesitated to apply the rule that unobjected-to prosecutorial argument cannot be urged on direct appeal, absent fundamental error.[7] *See, e.g.*, Chandler v. State, 702 So.2d 186, 191 (Fla. 1997), cert. denied, ___ U.S. ___, 118 S.Ct. 1535 (1998) (alleged personal attacks or other allegedly improper prosecutorial comments barred absent contemporaneous objection and accompanying motion for mistrial); Allen v. State, 662 So.2d 323, 328 (Fla. 1995), cert. denied, 517 U.S. 1107 (1996)(requiring contemporaneous objection and accompanying motion for mistrial to preserve allegedly improper prosecutorial comments for appellate review); Mordenti v. State, 630 So.2d 1080, 1084 (Fla.), cert. denied, 512 U.S. 1080 (1994)(denial of appeal where majority of the issues raised were not objected to at trial.)

As none of the foregoing comments were the subject of an

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[7] Accepting appellant's invitation to ignore the defense's failure to express a concern by appropriate objection below, would encourage trial judges to interject where the defense requests no relief. For example, if the trial judge in the instant case became offended by the prosecutor's comment regarding a possible motive and, *sua sponte*, declared a mistrial when no relief was sought by the defense at the mention of a possible motive, double jeopardy would preclude retrial if the defense successfully argued that the prosecutor's remarks were not so egregious as to amounting to a manifest necessity. *See* Cooper v. State, 716 So.2d 823 (Fla. 5DCA 1998); Thomason v. State, 620 So.2d 1234 (Fla. 1993); State v. Collins, 436 So.2d 147 (Fla. 2DCA 1983); Rodriguez v. State, 719 So.2d 1215 (Fla. 2DCA 1998).

objection below, appellant is not entitled to relief on these claims absent a showing of fundamental error. Sims v. State, 681 So.2d 1112 (Fla. 1996) (failure to object contemporaneously when prosecutor referred to defendant as a liar, accused defense counsel of misleading the jury, and bolstered his attacks on Sims' credibility by expressing his personal views and knowledge of extra-record matters not properly before Court on appeal and will not be considered.) See, also, Craig v. State, 510 So.2d 857, 864 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 732, 98 L.Ed.2d 680 (1988). For an error to be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process. Mordenti v. State, 630 So.2d 1080, 1084 (Fla. 1994), cert. denied, 512 U.S. 1080 (1994); State v. Johnson, 616 So.2d 1, 3 (Fla. 1993); Wyatt v. State, 641 So.2d 355 (Fla. 1994), cert. denied, 514 U.S. 1023 (1995); Street v. State, 636 So.2d 1297 (Fla. 1994), cert. denied, 513 U.S. 1086 (1995); Waterhouse v. State, 596 So.2d 1008 (Fla. 1992). None of the now challenged remarks constitutes fundamental error.

Moreover, even where a challenged comment is the subject of a contemporaneous objection, this Court has repeatedly recognized that "wide latitude is permitted in arguing to a jury." Thomas v.

State, 326 So.2d 413 (Fla. 1975); Spencer v. State, 133 So.2d 729 (Fla. 1961), cert. denied, 369 U.S. 880, 82 S.Ct. 1155, 8 L.Ed.2d 283 (1962), cert. denied, 372 U.S. 904, 83 S.Ct. 742, 9 L.Ed.2d 730 (1963). The legal metes and bounds of a prosecutor's arguments are defined by the evidence before the jury. United States v. Cole, 755 F.2d 748, 767 (11th Cir. 1985). Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments. Spencer. The control of comments is within the trial court's discretion, and an appellate court will not interfere unless an abuse of such discretion is shown. Thomas; Paramore v. State, 229 So.2d 855 (Fla. 1969), modified, 408 U.S. 935, 92 S.Ct. 2857, 33 L.Ed.2d 751 (1972).

In Esty v. State, 642 So.2d 1074 (Fla. 1994), cert. denied, 514 U.S. 1027 (1995) this Court found no merit to Esty's claim that he was entitled to a new trial because the trial court failed to grant a mistrial after the prosecutor made improper comments during closing argument describing Esty as a "dangerous, vicious, cold-blooded murderer" and warning the jury that neither the police nor the judicial system can "protect us from people like that" as the challenged comments were not so prejudicial as to vitiate the entire trial. Esty v. State, citing, Duest v. State, 462 So.2d 446, 448 (Fla. 1985). This Court further noted that the control of

the prosecutor's comments is within a trial court's discretion, and a court's ruling will not be overturned unless an abuse of discretion is shown. Esty v. State, citing, Durocher v. State, 596 So.2d 997, 1000 (Fla. 1992); Darden v. State, 329 So.2d 287, 289 (Fla. 1976), cert. denied, 430 U.S. 704, 97 S.Ct. 308, 50 L.Ed.2d 282 (1977) Compare, Paramore with Wilson v. State, 294 So.2d 327 (Fla. 1974). Breedlove v. State, 413 So.2d 1, 8 (Fla.), cert. denied, 459 U.S. 882, 103 S.Ct. 184, 74 L.Ed.2d 149 (1982)." Bonifay v. State, 680 So.2d 431 (Fla. 1996).

Since none of the challenged comments were preserved for appeal, the state urges this Court to uphold the procedural bar and deny any relief based on this claim. Moreover, none of the now challenged remarks when considered on their own merits and within the circumstances surrounding the complained of remarks so fundamentally tainted the process as to deprive the defendant of a fair and impartial trial.

1) motive for the crime:

During the instant trial the state argued that appellant's motive for the crime was financial. Appellant now contends that there was no evidence to support the state's theory and, although, *he concedes this claim was not argued below*, he contends that it was fundamentally wrong. This claim is procedurally barred.

Assuming, *arguendo*, this claim was preserved, it is without merit. Contrary to appellant's assertion, the state presented substantial evidence that Martinez had financial difficulties and that he planned to correct those difficulties at the time of the murder. His ex-wife, Sloane Martinez testified that although Martinez initially paid child support, that the payments tapered off because he had financial problems. She said that she had to lend him money. (T6:468-69) On Friday, October 27, before the murders, Martinez told her that he had a big business deal that was going to take him out of debt and make everything better. (T6:479) Laura Babcock testified that she and Martinez started dating late February-early March 1995 and that they started living together around June of 1995. They were getting ready to move to another apartment, on Saturday, October 28, but plans fell through due to financial problems. Martinez had told that her that he had put away money for the move, but she found out at last minute late that Friday that he did not have the money, so she had to move in with her mother. Martinez had paid the bills, etc., until about September. She had to pay the rent and bills for September and October. When she found out he didn't have the money, they decided to split up. Subsequently, he told her that he had taken the large plastic bag of marijuana off the table at "Michael's" (Lawson) when

he walked out the door, because "Michael" did not have money he owed him. (T8:785-87, 797, 882) This was confirmed by her friend, Eden Dominick, who testified that Martinez had business problems and they were worried about money. (T8:770) Martinez's half-brother, Ronnie Sabando also testified that appellant's business started having financial problems around August of that year. Ronnie lent him money. (T8:876)

This Court has repeatedly stated that logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments. Thus, the prosecutor, in the instant case, could reasonably infer from the foregoing, that Martinez's motive for killing McCoy-Ward and Lawson was financial. Moreover, despite the fact that the trial court <u>subsequently</u> declined to instruct on the pecuniary gain aggravating factor in the penalty phase, the state had a good faith basis to urge the financial motive during the guilt phase as evidence of premeditation. Thus, it was not improper to argue it as a motive for the crime. <u>Spencer v. State</u>, 133 So.2d 729 (Fla. 1961), <u>cert. denied</u>, 369 U.S. 880, 82 S.Ct. 1155, 8 L.Ed.2d 283 (1962), <u>cert. denied</u>, 372 U.S. 904, 83 S.Ct. 742, 9 L.Ed.2d 730 (1963). See, also, <u>Walker v. State</u>, 707 So.2d 300, 309 (Fla. 1997)(evidence showed Walker was not happy about taking financial responsibility for the child or recognizing his

paternity.)

Appellant also urges, based on the prosecutor's reference to the injunction Sloane Martinez had served upon appellant as the "court papers," that there was a deliberate false misrepresentation concerning those papers. To support this claim he takes a statement made during closing argument out of context and argues that it shows the prosecutor intended to mislead the jury into believing that the "court papers" created a need for money. (T10:1015-1018) Again, this claim is barred. Further, when the reference is viewed in context, it is apparent that the prosecutor was not suggesting that the papers created the need for money. The need for money already existed and, as previously shown, was well established. He was simply delineating the sequence of events leading up to and surrounding the time of the crime and noting the possible pressures leading up to the crime. It is logical to infer that any legal action would cause the defendant stress, whether it is financial or otherwise.

Moreover, the only confusion surrounding the "court papers" was a result of Martinez's motion in limine to keep the true nature of the papers from being argued to the jury. The motion in limine sought to exclude any reference to the injunction for spouse abuse by the defendant against his wife, Sloane Martinez. (T1:171;

T13:1253-54) As any confusion was caused by the defense's demand that the nature of the papers served on appellant be withheld from the jury, the state can hardly be faulted for that confusion. No harmful, reversible error has been shown. Nevertheless, the state urges this Court to reject this claim as procedurally barred.

2) <u>attacks on the defendant's character</u>

Appellant raises two areas where he contends the prosecutor made an impermissible attack on his character. The first challenge refers to the motion in limine about spousal abuse. Martinez now claims that twice during the testimony and once during summations, the pejorative term, "injunction" was used. A review of the record cites he relies upon in support of this claim reveals the use of the term injunction only once by a witness, Sloane Martinez, and once by the prosecutor. (T6:484, 519; T10:13) The comment by the prosecutor was not objected to and, in the context of this case, does not amount to fundamental error. (T10:13)

As to the statement by Sloane, she testified in response to the state's question as to what happened when the deputy got there, that she told the deputy she had injunction papers. This inadvertent comment by the witness was not made at the behest of the state and, therefore, does not constitute prosecutorial misconduct. Although, defense counsel objected and the objection

was sustained, no curative instruction was requested nor was a motion for mistrial made until much later when the state sought to introduce the tape. (T6:484, 519) In Parker v. State, 641 So.2d 369, 375-76 (Fla. 1994), cert. denied, 513 U.S. 1131 (1995), this Court found a similar claim procedurally barred where defense counsel merely stated: "I would like to reserve a motion your honor." Following the prosecutor's argument defense counsel in Parker moved for a mistrial based on the state's argument characterizing the defense as a fantasy. Quoting, Duest v. State, 462 So.2d 446, 448 (Fla. 1985), this Court noted that "the proper procedure to take when objectionable comments are made is to object and request an instruction from the court that the jury is to disregard the remarks" and that Parker had not complied with this procedure. Similarly, this procedure was not followed in the instant case. Therefore, this Court should find, as it did in Parker, that this claim has not been properly preserved and is, therefore, procedurally barred. Moreover, even if this claim was properly preserved, as Sloane did not state the purpose of the injunction, and as the jury was aware of the fact that Sloane Martinez and appellant were having domestic problems and that he was living with another woman, any prejudice resulting from her single reference to the injunction is harmless.

The second area concerns a statement made by the prosecutor during closing argument concerning Martinez's father sending money to Gerrard Jones but, not to Martinez's children and a question to Martinez's father during cross-examination as to whether he had sent the children money. No objection was presented concerning the comment made during closing argument. Thus, this claim has not been preserved for appeal.

Furthermore, the prosecutor's question and the statement made during closing were reasonable in light of the evidence in this case. Larry Merritt and Gerrard Jones testified about a scheme which was concocted by Martinez to implicate another individual in these murders in order to assist the defense in creating reasonable doubt as to Martinez's guilt. (T8:728) Martinez approached Jones and asked Jones to coach Merritt on the facts of the crime so that Merritt could claim that a man named Ali Bisset had admitted to Merritt that Bisset committed these murders. (T8:702-6, 726-8) Martinez described the facts of the crime to Jones, Jones wrote out the facts and gave the written notes to Martinez, who gave them to Merritt to study and learn. (T8:708, 726, 729-30)

For his assistance, Merritt was promised legal help with his appeal; Jones was to be paid $400 by Martinez's family. (T8:704, 732-4)

Appellant's father, Mr. Martinez, Sr., testified on behalf of Martinez that he sent money to Gerrard Jones because he was a paralegal and he was fixing his son's legal problems. (T9:892) He also testified that he sent Gerrard Jones' money because appellant told him to help out Jones' family because Jones was in jail and his family had no income. (T9:898) The prosecutor then asked Mr. Martinez if he had sent money to his own granddaughters. (T9:899) The "purpose of cross examination is to elicit testimony favorable to the cross-examining party . . . and to challenge the witness's credibility when appropriate." Chandler v. State, 702 So.2d 186, 196 (Fla. 1997), cert. denied, ___ U.S. ___, 118 S.Ct. 1535 (1998), quoting, Shere v. State, 579 So.2d 86, 90 (Fla. 1991). The suggestion that Martinez would have sent money to a virtual stranger to help out his family, rather than as payment for perjured testimony, was open to challenge by the state. The denial of the defense's objection to the single question from the state was within the court's discretion and appellant has failed to show an abuse of that discretion.

Likewise, even if his challenge to the statement during closing argument was not procedurally barred, it is equally without merit. The argument clearly went to the appellant's guilty knowledge in paying a witness to fabricate testimony implicating

someone else in the crime for which appellant was charged. (T10:1001-03) Both claims should be denied as they are without merit, the later is unpreserved and both are harmless, in the instant case.

3) <u>doubts as to guilt</u>

Appellant also challenges a question by the state during direct examination of Det. Conigliaro and a reference to that statement during closing argument regarding there being no doubt as to appellant's guilt. This argument was presented to rebut defense counsel's contention that Martinez's statements to Sloane were taken out of context. During cross-examination of Det. Conigliaro, defense counsel suggested that because many portions of the tape were inaudible that Martinez's statements only appeared to be inculpatory. Specifically, he inquired, "Wouldn't you agree in common experience if you have a conversation with somebody and you take a small excerpt of what is said, that the entire context of that conversation can be changed by taking out an excerpt . . . and that Ms. Martinez maybe cannot remember what was said because it was so inaudible, that all of this information that's on these transcripts can be taken totally out of context? (T5:611-613)

On redirect the state questioned the detective about his perception of the conversation having *heard* the entire conversation

at the time it happened. The record shows the following:

REDIRECT EXAMINATION

BY MR. COX:

Q. Corporal, when you were listening to that tape live, when you were listening to what was going on live on January 28th, right after that you said you authorized the arrest?

A. Absolutely.

Q. Was there any question, not based on your memory, not based on the transcript, was there any question in your mind at that time that the defendant had murdered Douglas Lawson?

MR. FOX: Objection. That's not a proper question.

MR. COX: He's asking about taking things out of context.

THE COURT: Overruled.

BY MR. COX:

Q. Was there any doubt in your mind based on what he said then that he was responsible for the murder of Douglas Lawson?

A. There was no doubt that he did it.

MR. COX: No further questions, Judge.

(T5:611-613)

The state notes that while an objection was raised to this line of questioning, as it did not present the claim as now argued to this Court, it has not been properly preserved for review. Parker v. State, 641 So.2d 369, 375-76 (Fla. 1994), cert. denied, 513 U.S. 1131 (1995). Furthermore, even if this claim was sufficiently presented to the trial court, it is without merit. As previously noted, defense counsel invited this line of questioning by implying that one could not really determine the context of the

statements because of the tape’s inaudibility and that they only sounded inculpatory when considered out of context. The denial of the limited objection and admission of this line of questioning was within the trial court’s discretion and appellant has failed to show an abuse of that discretion.

Appellant also challenges the prosecutor’s statement during closing argument to the effect that after the detectives heard Martinez’s statements to Sloane, he was arrested because nobody had a doubt he was guilty. No objection was raised at trial to the prosecutor’s statement during closing argument. While this type of comment is generally considered to be error, this Court requires a contemporaneous objection to be presented before it will be considered on appeal. In Sochor v. State, 619 So.2d 285 (Fla. 1993) pursuant to the contemporaneous objection rule, this Court rejected a number of Sochor’s claims, including his claim that government witnesses expressed an opinion as to his guilt.[8] This

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[8] The claims alleged by Sochor to be fundamental error were: (1) prosecutorial comments on facts outside the evidence; (2) opinions of government witnesses as to Sochor's veracity and guilt; (3) a defense witness's statement on cross-examination that an individual from the prosecutor's office compared Sochor to Ted Bundy; (4) arguments by the state that Sochor's trial was the only time the state could try him for his crimes; (5) other evidence of Sochor's bad character, the victim's good character, beauty, and family; and (6) perjured testimony by a jailhouse informant as to whether he received leniency from the state in return for his testimony regarding Sochor's incriminating statements. Sochor v. State, 619

Court also rejected Sochor's contention that fundamental error occurred and that the contemporaneous objection rule has less force in a capital case. Id. at 289-90, citing, Rose v. State, 461 So.2d 84 (Fla. 1984), cert. denied, 471 U.S. 1143, 105 S.Ct. 2689, 86 L.Ed.2d 706 (1985); see Pope v. Wainwright, 496 So.2d 798 (Fla. 1986), cert. denied, 480 U.S. 951, 107 S.Ct. 1617, 94 L.Ed.2d 801 (1987); Jones v. Wainwright, 473 So.2d 1244 (Fla. 1985).

Recently, in Ruiz v. State, 24 Florida Law Weekly S157 (Fla., April 1, 1999) this Court reversed where the prosecutor, during closing argument, repeatedly suggested that if the defendant was guilty, he would not be here. Unlike the challenged comments in Ruiz, the statement in the instant case was not objected to and, further, was no gratuitous assertion of the state's belief in the defendant's guilt. Rather, unlike the comment in Ruiz, the reference, in the instant case, was made in rebuttal to the defense contention that Martinez's statements to Sloane were taken out of context.

Thus, even if the claim was not procedurally barred, it is without merit, as it was a fair comment on the argument presented by the defense. See Garcia v. State, 644 So.2d 59, 62-3 (Fla.

So.2d 285, fn.7 (Fla. 1993)

1994), cert. denied, 514 U.S. 1085 (1995) (rejecting same arguments now presented by Martinez where the claim was not preserved and where the challenged comment was invited by defense counsel); Barwick v. State, 660 So.2d 685, 694 (Fla. 1995), cert. denied, 516 U.S. 1097 (1996)(rejecting Barwick's claim of prosecutorial misconduct where, in response to Barwick's assertion that the State was hiding something as to the circumstances under which Barwick made his taped confession, the State responded in closing argument that there was no evidence supporting the conclusion that any impropriety occurred; Hooper v. State, 476 So.2d 1253, 1257 (Fla. 1985), cert. denied, 475 U.S. 1098 (1986) (challenged remark was not a "golden rule" argument, but rather was fair comment on the evidence which was invited by defense counsel's attempt to impeach witness); Dufour v. State, 495 So.2d 154, 160-61 (Fla. 1986), cert. denied, 479 U.S. 1101 (1987)(prosecutor's statement merely rebutted the statement of the defense and fell into the category of an "invited response"); State v. Compo, 651 So.2d 127 (Fla. 2 DCA 1995)(statements by the state during closing argument responded to arguments and suggestions raised by the defendant during trial and fell into the category of "invited response" even where theory had been abandoned by defense counsel.) In the instant case, as defense counsel challenged the evidence by suggesting that the true

context of his statements implicating himself for the murders of McCoy-Ward and Lawson was unknown and that the statements attributed to Martinez conflicted with the evidence, the state properly responded to this claim.

Moreover, in light of the facts of this case and in the context which this comment was made, none of the prosecutor's arguments deprived the defendant of a fair and impartial trial, or were so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise. Accordingly, appellant has failed to carry his burden to establish harmful error. §924.051, Fla. Stat. (Supp. 1996); Spencer v. State, 645 So.2d 377, 383 (Fla. 1994)

The state urges this Court to deny those claims that were not presented to the court below as procedurally barred. The remainder of the claims concerned the admission of evidence which was within the trial court's discretion and should be denied as meritless. Esty v. State, 642 So.2d 1074 (Fla. 1994), cert. denied, 514 U.S. 1027 (1995). Parker v. State, 641 So.2d 369, 375-76 (Fla. 1994), cert. denied, 513 U.S. 1131 (1995); Barwick v. State, 660 So.2d 685, 694 (Fla. 1995), cert. denied, 516 U.S. 1097 (1996); Hooper v. State, 476 So.2d 1253, 1257 (Fla. 1985), cert. denied, 475 U.S. 1098 (1986). Furthermore, the state contends that error, if any,

is harmless in light of the evidence in this case, including appellant's own admissions of guilt.

4) Admission of Gruesome Photographs

Appellant's final claim of prosecutorial misconduct is based on the state's introduction of photographs of the victim's bodies. He contends that the introduction of these photographs "crossed the line." It is not prosecutorial misconduct to introduce relevant, albeit gruesome photographs. The admission of such evidence is a matter within the discretion of the trial court and appellant has failed to show an abuse of that discretion. Thompson v. State, 565 So.2d 1311, 1315 (Fla. 1990)(The gruesome nature of the homicide photographs does not render the decision to admit them into evidence an abuse of discretion.)

The test of admissibility of photographs in a situation such as this is relevancy and not necessity. State v. Wright, 265 So.2d 361, 362 (Fla. 1972) See also Henninger v. State, 251 So.2d 862, 864 (Fla. 1971); Meeks v. State, 339 So.2d 186 (Fla. 1976). The mere fact that such photographs are gruesome also does not preclude admission of otherwise relevant and admissible photographs. In Henderson v. State, 463 So.2d 196 (Fla. 1985), cert. denied, 473 U.S. 916 (1985), Henderson argued that the trial court erred by allowing into evidence gruesome photographs which he claimed were

irrelevant and repetitive. This Court found that the photographs, which were of the victim's partially decomposed body, were relevant.

> Persons accused of crime can generally expect that any relevant evidence against them will be presented in court. The test of admissibility is relevancy. Those whose work products are murder of human beings should expect to be confronted by photographs of their accomplishments. The photographs are relevant to show the location of the victims' bodies, the amount of time that had passed from when the victims were murdered to when the bodies were found, and the manner in which they were clothed, bound and gagged."

Id. at 200.

This Court further held that it is not to be presumed that gruesome photographs so inflamed the jury that they will find the accused guilty in the absence of evidence of guilt. This Court presumed that jurors are guided by logic and, thus, that pictures of the murder victims do not alone prove the guilt of the accused. Id. at 200.

Similarly, the fact that a number of photographs are admitted does not amount to an abuse of discretion. In Nixon v. State, 572 So.2d 1336, 1343 (Fla. 1990), this Court rejected Nixon’s contention that the admission of an “unnecessarily large number of inflammatory photographs” of the victim in a charred state resulted in a fundamentally unfair proceeding where he alleged there was no

justifiable relevancy for the admissibility of the photographs since the cause of death and nature of death had been clearly established and there was no circumstance which necessitated the introduction of photographs of the victim. Upon denying the claim this Court reiterated that the test of admissibility of photographs such as these is relevancy rather than necessity. Moreover, this Court held that despite the photographs' extremely gruesome nature, they accurately depict the fact that "Jeanne Bickner was the victim of a vicious, barbaric and savage murder."

In the instant case, the number and gruesomeness of the photographs was consistent with the number of victims, as well as the extent of injuries inflicted on the victims by Martinez. These photographs were relevant to show the manner in which the murder had been committed, the defensive wounds of the victims, the nature and the heinousness of the wounds that the victims received, the location of the bodies and the extent of the injuries and were used by the medical examiner, Dr. Lee Miller, to explain same.

During his testimony, Dr. Miller, used the photographs in question to explain the extensive number of gunshot wounds Lawson received and how they affected a number of vital organs. (T5:396-404) Using the photographs of Sherrie McCoy-Ward's injuries, Dr. Miller explained that she had a non-fatal bullet wound to right

shoulder and two large groups of multiple stab wounds, penetrating vital blood vessels. The photographs reflected six or seven wounds in the front of her neck. (T5:405-07) He noted that the victim was moving around at time they were inflicted. Dr. Lee also noted a number of defensive wounds to her hands and forearms. Dr. Lee testified that consistent with the position in which she was found, as reflected in the photographs, the autopsy showed that Ms. McCoy-Ward was not moving when a third group of about fourteen stab wounds to back of her neck was inflicted. (T5:408-09) As the photographs were relevant, and not unduly prejudicial, the trial court did not err in admitting them into evidence.

Based on the foregoing, the state urges this Court to deny those claims which were not the subject of a specific contemporaneous objection below and to find that the remaining claims are meritless or harmless.

ISSUE IV

WHETHER THE CONVICTION FOR ARMED BURGLARY IS SUPPORTED BY SUBSTANTIAL, COMPETENT EVIDENCE.

In addition to his convictions for first degree murder, Appellant was also convicted of the armed burglary of the Lawson/McCoy-Ward residence. Appellant maintains that his entry was consensual and that there was no evidence that the consent was withdrawn other than the fact that the murders occurred. Accordingly, he contends that his conviction for armed burglary must be set aside. It is the state's position that appellant's position is baseless in law and fact.[9]

As acknowledged by appellant, this Court has recently addressed this issue in Miller v. State, 24 Florida Law Weekly S155 (Fla., April 8, 1999)(reversing conviction for burglary of a grocery store) and in Robertson v. State, 699 So.2d 1343 (Fla. 1997)(affirming conviction for burglary of a residence). Martinez urges that this case is more like Miller than Robertson and, accordingly, the conviction should be set aside.

In Robertson, this Court addressed the question of whether the withdrawal of consent during a burglary of a residential dwelling

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[9]This claim is also procedurally barred. Appellant made a bare bones motion for judgment of acquittal which did specifically mention the burglary. Woods v. State, 24 Florida Law Weekly S183 (Fla. April 15, 1999).

can be established by circumstantial evidence. Quoting from Ray v. State, 522 So.2d 963, 966 (Fla. App. 3DCA 1988), this Court found that there was ample circumstantial evidence from which the jury could conclude that the victim of a brutal murder withdrew whatever consent she may have given Robertson to be in her apartment. Id. at 1346-47.

In Ray, the Third District thoroughly discussed the question at issue herein and concluded, as this Court did in Robertson, where the circumstances of the crime indicate a withdrawal of consent, one who commits a brutal murder within the victim's residence can also be convicted of the independent crime of burglary.

In Miller v. State, this Court addressed the application of Ray v. State, *supra*, to cases involving the "open to the public" affirmative defense, holding that if a defendant can establish that the premises were open to the public, then this is a complete defense to the charge of burglary. This Court in Miller explicitly limited this holding to the "open to the public" cases and did not reverse or otherwise reject its prior holding in Robertson or the holding in Ray. Thus, contrary to appellant's contention, the question to be resolved in the instant case is whether the circumstances of this case sufficiently establish that any consent

to enter was withdrawn during the course of this brutal double homicide. Clearly, it was.

The facts produced at trial showed that Doug had been shot several times, in the back, the shoulder, the neck, and through the hands. (T.5:394, 396-404) Sherrie had been shot in the shoulder and stabbed six or seven times in the front neck area, and about fourteen times in the back neck area; she also sustained a number of defensive stab wounds to the hands and forearms. (T.5:405-8) She was found slumped in a kneeling position by the front door, near a large glass table with keys and personal items on it. (T.5:352, 356-9) Thus, not only did Martinez shoot both of his victims but then pursued a wounded Sherrie McCoy-Ward as she attempted to escape his homicidal purpose. When taken in the light most favorable to the state, the jury could have reasonably inferred that consent was withdrawn during her struggle with appellant. Robertson v. State, 699 So.2d 1343 (Fla. 1997); Ray v. State, 522 So.2d 963, 966 (Fla. 3DCA). Accordingly, the state urges this Court to deny the instant claim of error as barred and without merit.

ISSUE V

WHETHER A NEW TRIAL IS REQUIRED DUE TO ALLEGED DISCOVERY VIOLATIONS.

Once again, appellant is asking this Court to reverse a valid judgment and sentence supported by overwhelming evidence of guilt, including Martinez's own admissions of guilt, based on mere speculation that error exists which was not brought to the attention of the trial court and is not apparent from the face of the record. He speculates that because two witnesses changed their testimony immediately prior to trial that a discovery violation occurred.[10] Martinez further suggests that defense counsel's failure to request a Richardson hearing or otherwise complain about the alleged discovery violation constitutes even more evidence of ineffective assistance of counsel.

The state suggests that it is equally plausible that defense counsel did not object because he was aware of the changed testimony prior to trial and because there was no discovery violation to be brought to the attention of the trial court. This is the reason for a contemporaneous objection rule. If there are

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[10] Although appellant notes that Laura Babcock also changed her testimony, appellant appears to be conceding that no error occurred regarding the admission of her testimony as the record shows that notice was given to defense counsel and that the trial court gave counsel the opportunity to depose her prior to trial.

errors, they should be presented to the trial court and rectified at the time of trial. Defense counsel’s failure to do so suggests that no error existed, not that he was “asleep at the wheel” as alleged by appellant. Regardless, even if there was a discovery violation, appellant cannot circumvent the procedural bar rule by simply asserting counsel’s ineffectiveness. Medina v. State, 573 So.2d 293, 295 (Fla. 1990)(procedural bar on twelve claims not excused by claim of ineffectiveness). See, also, Grossman v. Dugger, 708 So.2d 249, 253 (Fla. 1997); Matheson v. State, 500 So.2d 1341, 1343 (Fla. 1987). The failure to present this claim below bars appellate review. § 924.051, Fla. Stat.

Moreover, even if the state had failed to promptly notify defense counsel of the change in testimony, a proposition with which the state does not agree, this Court has made it clear that "unlike failure to name a witness, changed testimony does not rise to the level of a discovery violation and will not support a motion for a Richardson inquiry." Johnson v. State, 696 So.2d 326, 332-33 (Fla. 1997), cert. denied, ___U.S. ___, 118 S.Ct. 892 (1998), quoting, Bush v. State, 461 So.2d 936, 938 (Fla. 1984). The Johnson Court noted that the rationale behind such a rule is that "[w]hen testimonial discrepancies appear, the witness's trial and deposition testimony can be laid side-by-side for the jury to

consider. This would serve to discredit the witness and should be favorable to the defense."

In Johnson, this Court found no discovery violation where the State failed to disclose to the defense a meeting that the prosecutor had with a witness, Mr. Briggs, in the week prior to trial. Specifically, at the time of the crime, eyewitness Mr. Briggs qualified his identification of Johnson with the statement "[t]his guy that I am sure 80 percent was wearing a hat so that knocked out 20 percent." After a review session held in the week prior to trial, where the eyewitness Mr. Briggs looked again at the photographic line up, Mr. Briggs changed his testimony and stated that he was sure that Johnson was the person he saw pull out a gun.

Similarly, in Bush, this Court approved the admission of changed testimony where an investigator had stated in his deposition that a clerk from a nearby convenience store had not identified any photographs. At trial, the investigator testified that the witness identified Bush's photograph during the photo lineup. This Court held that the prosecutor's failure to inform the defense of this change of testimony is not a discovery violation and does not constitute the absolute legal necessity required for a mistrial. Id. at 938. See, also, Street v. State, 636 So.2d 1297, 1302 (Fla. 1994), cert. denied, 513 U.S. 1086

(1995)(No discovery violation resulted from state's failure to reveal police officer's testimony regarding encounter with defendant in jail, where officer explained that he had not mentioned jail incident at deposition because he was not asked if he had done anything after he left crime scene); Acevedo v. State, 547 So.2d 296, 297 (Fla. 3DCA 1989)(neither the prosecutor's discussion with the police officer and informant nor the inconsistent testimony concerned constituted a discovery violation.)

Moreover, even if this claim had been preserved and even if disclosure was required, the admission of the now challenged testimony of Eden Dominick and Tina Jones does not constitute reversible fundamental error and no relief is warranted.

A review of the record including the witnesses' trial testimony, the reconstruction hearing transcript and the deposition of Laura Babcock shows that over the weekend of April 5, 1997, Eden Dominick contacted prosecutor, Nick Cox and told him that Laura Babcock needed to speak to him as she had a change in her testimony. Mr. Cox met with Ms. Dominick and Ms. Babcock. Ms. Babcock made substantial changes in her testimony. The next day, Mr. Cox notified defense counsel Fox about the changed testimony. (SR2:22) On Monday, they went before the judge and agreed to a

continuance in order to allow defense counsel to depose Laura Babcock. (SR2:23) Mr. Cox did not recall if they discussed whether Ms. Dominick was going to testify that Martinez had a briefcase he asked her to keep and that Martinez's face was messed up but he knows he mentioned her during the discussion about Ms. Babcock. (SR2:40, 41, 50, 53, 65) Subsequently, during the deposition of Laura Babcock on April 7, 1997, Ms. Babcock gave the following testimony with regard to Ms Dominick's encounter with appellant on the night of the murder:

> Oh, the thing about the briefcase. I forgot about that. He had his briefcase with him. And Tommy had drove him home in Tom's car, and he had asked -- or maybe it was before at Eden's house, I'm not sure. <u>I think this happened at Eden's house.</u>
>
> And he had asked Tom to leave his briefcase in the trunk of the car. <u>And she didn't want it in the car because she didn't know what was going on. I guess because she felt maybe something wasn't right with him or whatever. I don't know. You can ask her about that.</u>
>
> <u>But she argued the fact that she didn't want to hang on to his briefcase for him. And she had said something to me about it when we talked on the phone.</u>
>
> So, of course, that was one of the questions I asked him when he got home. And I grabbed a screwdriver out of the drawer, and I said, "If you don't open it now, I'm gonna pry it open." And that's when he told me about the big bag of pot was in there.
>
> MR. FOX: All right. Did -- I'm sorry.
>
> MR. FRASER: Go ahead.

(SR3:148-49)(emphasis added)

Given the foregoing, it is unquestionable that Ms. Dominick’s testimony did not come as a surprise to defense counsel. Accordingly, error, if any was harmless. Failure to conduct Richardson hearing on a discovery violation is no longer per se reversible error, but may be harmless if there was no reasonable possibility that discovery violation procedurally prejudiced the defense. Pender v. State, 700 So.2d 664 (Fla. 1997). Accord, Norton v. State, 709 So.2d 87, 95 (Fla. 1997) (Trial court's possible error in failing to initiate Richardson hearing following state's attempt to introduce into evidence photograph of murder defendant's car with window in "up" position was harmless, as risk of surprise to defendant was nonexistent in that defendant knew position of car window prior to state's introduction of picture); Pomeranz v. State, 703 So.2d 465, 468-69 (Fla. 1997)(discovery violation which occurred when state failed to provide defendant with copy of witness deposition was harmless where defense had same opportunity as state to question witness.)

Appellant also alleges unpreserved error with regard to the testimony of the victim’s sister, Tina Jones. Tina Jones discovered the bodies and called the police. She told the police at that time that the last time she spoke to Sherrie was on the

phone on Saturday. At trial, she testified that a few months ago she realized that she may have been mistaken, then this past week, on Monday, she discovered that she had been incorrect. She noted that everyone else knew she was wrong, but she was not convinced in her own mind until this Monday. (T7:652-56) At the reconstruction hearing, Mr. Cox noted that after talking to Laura Babcock, that he ordered the phone records for the McCoy-Ward-Lawson households and showed them to Tina Jones. (SR2:34-35) The records show that one call was made from Barbara McCoy's to Sherrie McCoy -Ward's on October 27, 1995 at 12:48 p.m. for 39 minutes. The last long distance call made from Sherrie's number was at 5:01 p.m. on October 27, 1995, to Barbara McCoy's house, for one minute. (T7:657-64)

Martinez is now alleging that although no objection was raised to this changed testimony below, that it is obvious that this was a discovery violation and counsel should have requested a Richardson hearing. As previously noted, changed testimony does not rise to the level of a discovery violation and will not support a motion for a Richardson inquiry. Johnson v. State, 696 So.2d at 332-33. Moreover, there is nothing in this record to show that defense counsel was not aware that Ms. Jones was going to change her testimony or that he was unaware of the evidence contained in

the phone records.

As previously noted, Martinez’s only assertions regarding how his trial strategy would have been different had he known about the changed testimony of Eden Dominick and Tina Jones was that he might have realized that implausibility of acquittal and accepted a plea offer from the state. This an insufficient showing of prejudice. Pomeranz v. State, 703 So.2d 465, 468-69 (Fla. 1997)(declining to find prejudice where Pomeranz's only assertions regarding how his trial strategy would have been different had he known that the State intended to use witnesses’ deposition were that he might have objected to having her called as a court witness or might have redeposed her.) It also appears to be a concession that given the weight of the state’s evidence against him, acquittal was doubtful. Compare, Gordon v. State, 704 So.2d 107, 113 (Fla. 1997) (finding that Gordon’s admission in his brief that even alleged statement that 'the doctor didn't want to give up the piece of paper,' is entirely consistent with a burglary or robbery, as opposed to a murder," was a concession, as the circumstantial evidence indicated, that he was inside the apartment to, at least, perpetrate a robbery.) Given this concession, appellant’s demand for a new trial would seem to be a waste of judicial resources, as

this evidence would unquestionably be admissible at a new trial. [11] Thus, if the admission of this evidence makes acquittal implausible, as appellant concedes, a new trial would have the same result.

Accordingly, the State maintains that no error, fundamental or otherwise, has been shown. However, because this claim was not presented to the court below, it should be denied as procedurally barred.

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[11] Further, as Laura Babcock testified to essentially the same facts, error, if any, regarding Eden Dominick and Tina Jones is harmless.

ISSUE VI

WHETHER APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL IS APPARENT ON THE FACE OF THE RECORD SO AS TO ALLOW REVIEW ON DIRECT APPEAL.

Although appellant acknowledges that ineffective assistance of counsel generally is not cognizable on direct appeal, he contends that this case presents unique circumstances warranting reversal because of counsel's deficient performance. It is the state's position that this claim is not properly before this Court and, therefore, should be denied.

Through the years this Court has routinely held that such claims are not reviewable on direct appeal but are more properly raised in a motion for post-conviction relief. Wuornos v. State, 676 So.2d 972, 974 (Fla. 1996) (concluding that claim of error on direct appeal constituted an ineffective assistance claim cognizable "only by collateral challenge"); Kelley v. State, 486 So.2d 578, 585 (Fla. 1986) (stating that ineffective assistance claims are generally not reviewable on direct appeal and are more properly brought in postconviction motions.) See, also, Rivera v. State, 717 So.2d 477, 484 (Fla. 1998); Perri v. State, 441 So.2d 606 (Fla. 1983); State v. Barber, 301 So.2d 7 (Fla. 1974).

Moreover, even if such claims were reviewable on direct appeal, appellate review is not available where the claim has not

been presented to the trial court and where the record is insufficient to for adequate appellate review of the claim. Under section 924.051, Florida Statutes. (Supp. 1996), which was created by the Criminal Appeal Reform Act of 1996. (ch. 96-248, §4, at 954, Laws of Fla.) an appeal may not be taken nor may a judgment or sentence be reversed on appeal unless prejudicial error occurred and *was properly preserved in the trial court* or, if not properly preserved, would constitute fundamental error. This Court, in Combs v. State, 403 So.2d 418, 421-22 (Fla. 1981), set forth the proper procedure for raising claims of ineffective assistance of trial counsel, stating :

> Section 921.141(4) requires that the "judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court ... after certification by the sentencing court of the entire record...." We construe that terminology to require a full record review for trial error and a determination of the sufficiency of the evidence, as well as the appropriateness of the imposition of the death sentence. If appellate counsel in a criminal proceeding honestly believes there is an issue of reasonably effective assistance of counsel in either the trial or the sentencing phase before the trial court, that issue should be immediately presented to the appellate court that has jurisdiction of the proceeding so that it may be resolved in an expeditious manner by remand to the trial court and avoid unnecessary and duplicitous proceedings. (FN1) State v. Meneses, 392 So.2d 905 (Fla.1981). No trial court error has been

> presented to us, and from our review of the record we find none. We find the evidence is not only sufficient but overwhelming for the conviction of this appellant of first-degree murder.

Id. at 422 (emphasis added)

Similarly, in Dennis v. State, 696 So.2d 1280 (Fla. 4DCA 1997), Dennis argued that she was entitled to a new trial as a result of ineffective assistance of counsel, because her trial attorney failed to request a self defense instruction. Upon denying the claim, the fourth district noted that "the general rule is that the adequacy of a lawyer's representation may not be raised for the first time on a direct appeal. The rationale for the rule is the issue has not been raised or ruled on by the trial court." The court, noting that the case law basis for the rule has been reinforced by the passage of section 924.051, Florida Statutes. (Supp.1996), held:

> This case demonstrates why the law should require an ineffective assistance claim to be presented first to the trial court. The record does not contain counsel's thinking concerning the self defense issue. Nor do the pages of the transcript give any sense of how the trial developed. It may have been that the state witnesses were so numerous and so convincing that a self defense approach withered under scrutiny and that counsel would have lost credibility with the jury by advancing it. This case does not present that narrow category of cases--such as where the claim of ineffectiveness arises from a

> conflict of interests between co-defendants represented by the same attorney--to justify departure from the general rule requiring the ineffectiveness of counsel issue to be presented first to the trial court in a motion for post-conviction relief. See Foster v. State, 387 So.2d 344 (Fla.1980); Gordon v. State, 469 SO.2D 795 (Fla. 4TH DCA 1985). (FN1)[12]. (ineffectiveness based on defense counsel's failure to object to repeated prosecutorial improprieties), cert. denied, 480 So.2d 1296 (Fla.1985); Washington v. State, 419 So.2d 1100, 1101, n. 3 (Fla. 3d DCA 1982); Wright v. State, 423 So.2d 633 (Fla. 5th DCA 1982)

Dennis v. State, 696 So.2d 1280, 1282 (Fla. App. 4 Dist. 1997)

As Martinez neither raised this claim below not sought leave from this Court to return to the trial court for evidentiary review, this claim should be denied and his assertions of ineffective assistance left for postconviction review. Combs. Were this case on collateral review, and this claim had not been presented to the court below, this Court would not hesitate to deny this claim as procedurally barred. To allow this claim to now be presented without ever having been presented to the trier of fact is contrary to the statute and to this Court's precedent.

Moreover, as the court noted in Dennis, an appellate court should consider a claim of ineffective assistance on direct appeal

[12] In a footnote, the court further stated, "We do not reach in this case the continued viability of Gordon v. State in light of the passage of section 924.051, Florida Statutes. (Supp.1996) "

only when there can be no issue of trial tactics, there is no question of harmless error, and all facts are readily apparent on the face of the record without a need to ascertain additional facts. Dennis v. State, 696 So.2d 1280, 1282 (Fla. App. 4 Dist. 1997) See, also, Wuornos v. State, 676 So.2d 972, 974 (Fla. 1996), citing, Loren v. State, 601 So.2d 271, 273 (Fla. 1DCA 1992); Gordon v. State, 469 So.2d 795 (Fla. 4DCA 1985)(Anstead, C.J., concurring) Appellee respectfully submits that the record and arguments before the Court in the instant case do not justify departing from this well-established rule. This case does not present any issue that falls within the narrow exception for raising ineffective assistance of counsel on direct appeal. Accordingly, the State urges that this Court should decline the invitation to review this claim on the merits and to leave this issue for review in a post-conviction proceeding.

Further, even if counsel's performance could be deemed deficient on the face of this record, a proposition with which the state does not agree, Martinez has, nevertheless, failed to establish prejudice that resulted from counsel's performance. The United States Supreme Court has identified only a narrow category of cases in which prejudice is presumed, consisting of those cases in which there has been an "[a]ctual or constructive denial of the

assistance of counsel altogether"; or where there was "various kinds of state interference with counsel's assistance," or where counsel has an actual conflict of interest. Strickland v. Washington, 466 U.S. 668 (1984); Cuyler v. Sullivan, 446 U.S. 335 (1980) Prejudice is presumed in those circumstances because prejudice is so likely to occur that it is not necessary to undertake a case-by-case inquiry.

In Foster v. State, 387 So.2d 344 (Fla. 1980), this Court found that actual conflict of interest existed because of the defense attorney's joint representation of the defendant and a state witness, which denied the defendant his right to effective assistance of counsel. Clearly, this fits within the *per se* rule set out above, where prejudice is presumed. Also, the determination involves an objective question: either the attorney represented these two people with conflicting interests or he did not.

To support his claim of error, however, appellant cites to Owen v. State, 560 So.2d 207 (Fla. 1989); Gordon v. State, 469 So.2d 795 (Fla. 4th DCA 1985); and Ross v. State, 23 Fla. L. Weekly D2712 (Fla. 2DCA, Dec. 11, 1998). In Owen , this Court refused to consider Owen's claim of ineffective assistance of counsel, stating:

> Owen has filed two pro se briefs, in addition to the briefs filed by his counsel. Most of the issues raised duplicate those raised by appointed counsel, but one issue merits comment. Owen claims that his trial counsel, who is also serving as his appellate counsel, was ineffective. Although this issue is customarily handled in a 3.850 hearing, it may be raised on direct appeal under rare circumstances where it is preserved and the ineffectiveness is apparent on the face of the record. Refusal to address the issue under such circumstances would be a waste of judicial resources. No such circumstances exist here. Blanco v. Wainwright, 507 So.2d 1377, 1384 (Fla.1987) *Here, there is nothing on the face of the record even remotely suggesting ineffective assistance of trial counsel and appellant repeatedly expressed satisfaction with trial counsel's performance in response to queries from the trial judge*.

Owen v. State, 560 So.2d 207, 212 (Fla. 1990)(emphasis added)

In Gordon and Ross, however, the courts found ineffective assistance of counsel and reversed. The state submits that both cases were wrongly decided. As previously noted, the validity of Gordon has been questioned by the court in Dennis. As for Ross, it is currently pending before this Court on a question of conflict with Anderson v. State, 467 So.2d 781 (Fla. 3DCA 1985). Moreover, both opinions turn the Strickland analysis for evaluating ineffective assistance claims on its head by presuming that there could be no tactical reason for a trial attorney's decision to make no objection below. Clearly, this is contrary to precedents from

both this Court and the federal courts. Rivera v. State, 717 So.2d 477, 486 (Fla. 1998); Van Poyck v. State, 694 So.2d 686 (Fla. 1997); Wright v. State, 581 So.2d 882 (Fla. 1991); Sims v. Singletary, 155 F.3d 1297 (11th Cir. 1998); Duren v. Hopper, 161 F.3d 655 (11th Cir. 1998) See, also, Anderson v. State, 467 So.2d 781 (Fla. 3d DCA 1985)(defense attorney did not wish to antagonize the judge or jury by objecting.)

The Anderson court's detailed explanation for its holding is directly applicable to the instant case:

> The sole basis in this case for concluding that counsel's representation of the defendant constituted "a substantial and serious deficiency measurably below that of competent counsel," see Knight, *supra* at 1001, is that counsel failed to preserve for appellate review an otherwise reversible error, to wit: he failed to object and move for a mistrial based on the prosecutor's alleged improper comments made in opening statement and closing argument to the jury. . .(FN3) Assuming without deciding that these comments would have constituted reversible error had the record been properly preserved below, we think counsel's failure to do so cannot, without more, satisfy this element of the aforesaid Knight-Strickland standard for ineffective assistance of counsel. We reach this conclusion for two reasons. [footnote omitted]
>
> First, any different result would substantially undermine, if not utterly destroy, the preservation of error rule in Florida as applied to criminal cases. Compare Castor v. State, 365 So.2d 701, 703 (Fla.1978)

If counsel should fail, as here, to preserve for appellate review an otherwise reversible error, it would be of little moment as the conviction would still be subject to being vacated based on an ineffective assistance of counsel claim. The preservation of error rule would have no real consequence as it would apply only when counsel failed to preserve points which would not have merited a reversal in any event. In effect, a "wild card" exception to the preservation of error rule would be created allowing appellate courts to pass on the merits of unpreserved, non-fundamental errors in criminal cases, and to upset criminal convictions based thereon. See Cox v. State, 407 So.2d 633 (Fla. 3d DCA 1981) We cannot accept such a fatal undermining of our preservation of error rule.

Second, we cannot agree that, ipso facto, a failure to preserve an otherwise reversible error for appeal establishes that counsel has made a professional mistake in judgment, much less committed the serious type of error which the Knight-Strickland standard contemplates. In the context of this case, *opinions by experienced trial lawyers differ widely as to whether it is wise to object and move for a mistrial in the midst of a prosecuting attorney's argument to the jury*. Some advise against it, or suggest it be used sparingly, as they feel such objections tend to antagonize the judge or jury thus jeopardizing future court rulings or a favorable verdict. Accord R. Keeton, Trial Tactics and Methods Secs. 4.2, 5.4. (1973) Moreover, they contend that inflammatory-type arguments often boomerang against the prosecutor in the eyes of the jury, and are best handled in rebuttal or by ignoring the arguments altogether. Others contend that objections only tend to emphasize the argument and generally ought not be made. In addition, counsel must weigh whether a mistrial at this point would be in

the client's best interests given his assessment of the likelihood of an acquittal. Compare Nelson v. Reliable Insurance Co., 368 So.2d 361 (Fla. 4th DCA 1978) *In sum, the decision to object and move for mistrial based on a prosecutor's improper argument is a complicated trial strategy decision in which reasonably competent criminal defense lawyers may and often do differ*. Absent special circumstances, the failure to so object and move for a mistrial cannot amount to ineffective assistance of counsel. Collins v. State, 536 S.W.2d 928. (Mo.App.1976) [emphasis added]

We do not overlook the expert testimony adduced below from an able criminal defense lawyer that counsel's failure to preserve the record for appeal on the prosecuting attorney argument point was not "within the standard of reasonably competent counsel in this community.". . . (Transcript, rule 3.850 hearing [T.], at 41) The sole basis for this expert opinion, however, was that the comments in question were legally objectionable and therefore counsel should have objected and moved for a mistrial to preserve the point for appeal. (T 41-45) The witness did not take into account what tactical reasons, if any, counsel might have had for not objecting or moving for a mistrial. Indeed, the witness did not speak to trial counsel in this case and did not consider trial strategy factors at all in rendering his opinion. Consequently, the witness' expert opinion on this matter was, itself, fatally flawed under the Knight-Strickland standard. Moreover, it should be noted that trial counsel did not testify as a witness at the hearing below.

As stated in Strickland, "[judicial scrutiny of counsel's performance must be highly deferential," and "a court must indulge a strong presumption that counsel's conduct

> falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " --- U.S. at ----, 104 S.Ct. at 2065-66, 80 L.Ed.2d at 694-95. No such showing has been made herein that counsel's decision not to object and move for a mistrial could not be considered sound trial strategy, and therefore, the strong presumption that counsel's conduct fell within the wide range of reasonably professional assistance has not been overcome in this case.

Anderson, 467 So.2d 786-88

It is notable that in Anderson there had been an evidentiary hearing at which the defendant elicited expert testimony that his trial counsel's performance fell below that of "reasonably competent counsel in the community," yet the district court still found that the Strickland standard had not been satisfied. In contrast, in both Ross and Gordon, the courts jumped over an evidentiary inquiry and assumed that counsel's performance was below professional standards and prejudicial. Appellee contends that trial counsel's failure to object or move for a mistrial are not matters that clearly mandate reversal so as to be a waste of judicial resources in a collateral proceeding. Such issues are best resolved collaterally where a full evidentiary hearing can be

conducted.[13]

Nevertheless, should this Court determine that a review of the merits of this claim is appropriate, it is the state's position that neither deficient performance nor prejudice has been shown. In his brief on appeal, appellant alleges the following as omissions of counsel that constitute ineffective assistance of counsel:

1. A statement by defense counsel in voir dire that he believes in the death penalty (T4:235);
2. The failure to file a notice of alibi;
3. The failure to object to the prosecutor's eliciting testimony that the Defendant failed to pay child support;
4. The failure to object to the prosecutor eliciting testimony that the Defendant was unfaithful to his pregnant wife;
5. The failure to request a jury instruction regarding the appropriate use of the transcript prepared by the State. (See Issue II);
6. The failure to object and request a Richardson hearing when Ms. Jones offered new, substantial and damaging testimony changing the time of death. (See Issue V);
7. The failure to object and request a Richardson hearing when Ms. Dominick offered new, substantial and damaging testimony regarding the eve of October 27th. (See Issue V);
8. The failure to request an -, notwithstanding the elicitation of testimony and the presentation of the defense of alibi in summation. (See Issue I);
9. The failure to object to false representations made by

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[13] Appellant's request that this Court not limit his ability to raise this claim subsequently on collateral review supports the state's contention that this matter is best left for evidentiary consideration in order that the claim can be assessed in the context of all of the relevant facts.

the prosecutor in closing argument regarding "legal papers" to establish a motive.(See Issues I and III); and

10. The failure to object to the prosecutor's reference in summation that both the detective and a fellow assistant State attorney had no doubt of the Defendant's guilt. (See Issue III).

(Initial Brief of Appellant, pgs. 87-88)

As previously noted, the failure to object or move for a mistrial does not constitute *per se* ineffective assistance of counsel. A defense counsel in a criminal trial is often called upon to make difficult choices among a number of legitimate options. The Supreme Court in Strickland recognized that "it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." 466 U.S. at 689, 104 S.Ct. at 2065. Only if an act or omission is outside "the wide range of professionally competent assistance" will it be deemed unreasonable. Id. at 690, 104 S.Ct. at 2066. These claims are more appropriately considered in the context of all of the relevant facts, after an evidentiary hearing and a determination of what, if any, trial strategy was employed by counsel during the instant trial. Notwithstanding the foregoing, a review of each of these claims establishes that counsel's performance was constitutionally adequate and that no prejudice resulted to the defendant as there was a strategic basis for each decision made by defense counsel.

For example, appellant challenges defense counsel's failure to request a Richardson hearing with regard to the testimony of Jones and Dominick. In Collins v. State, 671 So.2d 827, 828 (Fla. App. 2 Dist. 1996), Collins urged reversal of a summary denial of his claim that counsel was ineffective for failing to object or request a Richardson hearing when, contrary to her deposition testimony, a police officer offered testimony at trial placing the defendant at the scene of the crime. The Second District Court of Appeals remanded for an evidentiary hearing noting that the omission may have been error on the part of the attorney or it may have been trial strategy and that matters of trial strategy should not be determined without an evidentiary hearing.

Furthermore, in the instant case, as the state noted in Issue 5, no error has been shown as this Court has held that changed testimony will not support a motion for a Richardson hearing. Additionally, the record shows counsel became aware of the content of Ms. Dominick's testimony during his deposition of Laura Babcock. Similarly, the record shows that counsel was aware of the fact that phone records and other physical evidence establishing that Ms. Jones was incorrect regarding her belief that the last time she talked to her sister was Saturday. There is no evidence in this record that this testimony was a surprise to defense counsel and no

indication that a Richardson hearing was appropriate or that it would have been successful in precluding or limiting the challenged testimony. Moreover, even if it had, the jury already had this evidence by way of the phone records and Laura Babcock's testimony, the admission of which remains unchallenged. Therefore, not only has Martinez failed to show that counsel's performance was deficient or that any prejudice resulted from counsel's failure to request a Richardson hearing, but, also, that any harmful error occurred.

Appellant next challenges, defense counsel's decision to not request an alibi instruction or to file a Notice of Alibi. Although both decisions can be attributed to trial strategy, without the benefit of an evidentiary hearing, we are left to speculate as to the basis for those decisions. However, the record shows that Martinez was attempting to persuade Sloane to provide a false alibi for him for the night of the murders. Counsel's decision to not request an alibi instruction left the suggestion of alibi before the jury for its consideration without the limiting portion of the instruction before them. Moreover, the absence of a Notice of Alibi in no way limited counsel's ability to present alibi evidence. Therefore, he was able to not narrow the alibi defense down and yet, still present evidence of same. Cf.

Commonwealth v. Roxberry, 553 A.2d. 986, 988 (Pa. 1992)(Failure to give written notice of alibi not ineffective assistant of counsel where evidence was admitted). Accordingly, not only has appellant failed to show that error is apparent on the face of the record without need for evidentiary inquiry, he has also failed to show that counsel's performance was deficient or that he was in any way prejudiced by that performance.

ISSUE VII

WHETHER FLORIDA'S CAPITAL SENTENCING STATUTE IS CONSTITUTIONAL.

Appellant also challenges the constitutionality of Florida's capital sentencing statute. Specifically, he asserts that it is unconstitutional because, 1) it permits imposition of the death penalty based upon a bare majority, 2) it does not provide adequate guidance to the sentencing jury or require written findings by the jury and, 3) it creates an unconstitutional presumption in favor of death. (T1:119-134)

As appellant acknowledges, this Court has repeatedly rejected similar challenges to Florida's capital sentencing statute. San Martin v. State, 705 So.2d 1337, 1350 (Fla. 1997); Larzelere v. State, 676 So.2d 394, 408 (Fla. 1996), cert. denied, 519 U.S. 1043 (1996); Fotopoulos v. State, 608 So.2d 784, 794 & n. 7 (Fla. 1992),

cert. denied, 508 U.S. 924 (1993)

As appellant has failed to provide any basis for overturning the foregoing, the state asserts that this claim should be denied.

ISSUE VIII

WHETHER ALLEGED ERRORS IN THE PENALTY PHASE AND THE SENTENCING PROCESS RENDERED THE PROCESS UNFAIR, IN VIOLATION OF FLORIDA LAW AND THE UNITED STATES CONSTITUTION, AMENDMENTS V, VI, VIII AND XIV.

Appellant next alleges that his sentencing process was encumbered by errors regarding the inappropriate application of two aggravating circumstances; 1) during the course of a burglary and, 2) heinous, atrocious or cruel. It is the state's position that the trial court properly found both aggravators, that the sentence was properly imposed and that error, if any, was harmless.

a.) During the Course of a Burglary

In the sentencing order, the trial court explained the factual basis upon which the finding of this factor rested:

> The capital felony was committed while the defendant was engaged in the commission of, or attempt to commit, or escape after committing a burglary. The evidence shows that these murders occurred in the living room of the home of the victims, Mr. Lawson and Ms. McCoy-Ward. The defendant was contemporaneously convicted of armed burglary of a dwelling. This aggravating factor was proved as to each murder beyond a reasonable doubt.

(T2:332)

Appellant contends, as he did in Issue 4, that there was insufficient evidence to support the burglary conviction.

Therefore, he contends, that this aggravator should be aside and a new penalty phase ordered. It is the state's position that this claim was not presented to the trial court and is therefore, barred. Furthermore, the evidence was sufficient to support the finding and, finally, error, if any, was harmless.

Additionally, based on the contention that it is "the rare murder that occurs outdoors," Martinez asserts that finding the burglary aggravating factor based upon the withdrawal of consent does not sufficiently narrow the class of eligible persons because then most murders would have an automatic aggravating factor. This argument has a number of flaws.

First, as the following list demonstrates and contrary to appellant's assertion that "it is the rare murder that occurs outdoors," this Court has reviewed a significant number of murders committed outdoors. e.g., Chandler v. State, 702 So.2d 186 (Fla. 1997), cert. denied, ___ U.S. ___, 118 S.Ct. 1535 (1998); Sexton v. State, 697 So.2d 833 (Fla. 1997); Coolen v. State, 696 So.2d 738 (Fla. 1997); Pangburn v. State, 661 So.2d 1182 (Fla. 1995); Hunter v. State, 660 So.2d 244 (Fla.), cert. denied, 516 U.S. 1128 (1995); Bogle v. State, 655 So.2d 1103 (Fla.), cert. denied, 516 U.S. 978 (1995); Windom v. State, 656 So.2d 432 (Fla. 1995); Layman v. State, 652 So.2d 373 (Fla. 1995); Henry v. State, 649 So.2d 1366

(Fla. 1994), cert. denied, 515 U.S. 1148 (1995); Thompson v. State, 648 So.2d 692 (Fla. 1995); Taylor v. State, 638 So.2d 30 (Fla. 1994); Crump v. State, 622 So.2d 963 (Fla. 1993); Burns v. State, 609 So.2d 600 (Fla. 1992); Fotopoulos v. State, 608 So.2d 784 (Fla. 1992), cert. denied, 508 U.S. 924 (1993); Dougan v. State, 595 So.2d 1 (Fla. 1992); Hodges v. State, 595 So.2d 929 (Fla.), cert. denied, 506 U.S. 803 (1992); Dailey v. State, 594 So.2d 254 (Fla. 1992); Scott v. State, 581 So.2d 887 (Fla. 1991); Shere v. State, 579 So.2d 86 (Fla. 1991); Taylor v. State, 583 So.2d 323 (Fla. 1991); Grossman v. State, 525 So.2d 833 (Fla. 1988), cert. denied, 489 U.S. 1071 (1989); Atkins v. State, 497 So.2d 1200 (Fla. 1986); Lambrix v. State, 494 So.2d 1143 (Fla. 1986); Peede v. State, 474 So.2d 808 (Fla. 1985); Koon v. State, 463 So.2d 201 (Fla.), cert. denied, 472 U.S. 1031 (1985); Squires v. State, 450 So.2d 208 (Fla. 1984); Johnson v. State, 438 So.2d 774 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984); Waterhouse v. State, 429 So.2d 301 (Fla.), cert. denied, 464 U.S. 977 (1983); Mann v. State, 420 So.2d 578 (Fla. 1982); Tafero v. State, 403 So.2d 355 (Fla. 1981); Witt v. State, 342 So.2d 497 (Fla. 1977).

Further, as it has been a basic premise in our law that the home is a special place of protection and security, State v. Bobbitt, 415 So.2d 724, 727 (Fla. 1982) consideration of this fact

as an aspect of an existing aggravating factor has a rational basis. State v. Breedlove, 655 So.2d 74, 76 (Fla. 1995)(killing was "far different from the norm of capital felonies" and set apart from other murders where attack occurred while the victim lay asleep in his bed as contrasted with a murder committed in a public place); Haliburton v. State, 561 So.2d 248, 252 (Fla. 1990), cert. denied, 501 U.S. 1259 (1991)(victim in his own home and bed when attacked without provocation and vainly attempted to defend himself); Dudley v. State, 545 So.2d 857, 860 (Fla. 1989) (circumstances surrounding the victim's death including apparent struggle for life while being accosted in her own home supports application of this aggravating circumstance); Perry v. State, 522 So.2d 817, 821 (Fla. 1988) (Vicious attack within the supposed safety of victim's home adds to the atrocity of the crime.)

Under such circumstances, the finding of an aggravating circumstance based on the commission of a burglary is no more an automatic aggravating factor than a finding of any other felony committed during the commission of a felony murder. This Court has consistently rejected claims that a conviction for felony murder results in the application of an automatic aggravating factor. For example, in Hudson v. State, 708 So.2d 256, 262 (Fla. 1998), this Court rejected Hudson's claim that the trial court erred in

imposing the aggravating circumstance of "capital felony committed while the defendant was engaged in the commission of an armed burglary" and his allegation that the finding would transform the aggravating circumstance into an automatic and unconstitutional aggravator because it would be predicated upon the same felony (burglary) that formed the basis for the conviction. Accord, Blanco v. State, 706 So.2d 7 (Fla. 1997); Orme v. State, 677 So.2d 258 (Fla.), cert. denied, 519 U.S. 1079 (1996).

Accordingly, as the aggravating factor was supported by the evidence and as there is no support for appellant’s contention that the consideration of this factor is unconstitutional as an automatic aggravating factor, the state urges this Court to affirm the lower court’s findings. Furthermore, error, if any, is harmless as there are two remaining aggravating factors: 1) prior violent felony (contemporaneous homicide of Douglas Lawson) and, 2)heinous, atrocious or cruel, balanced against insubstantial mitigation.

b.) Heinous, atrocious or cruel

In the sentencing order the trial court found the following with regard to the heinous, atrocious or cruel aggravating factor:

> 3. The capital felony was especially heinous, atrocious, or cruel. The evidence shows as follows: Mr. Lawson was shot four times with a nine

millimeter firearm. One of the shots was certainly fatal though not immediately so and Mr. Lawson probably retained consciousness for one to two minutes during which time he was probably aware of the attack being made by the defendant upon his girlfriend, Ms. McCoy-Ward. The attack upon Ms. McCoy-Ward lasted, probably, for one to two minutes. She was first shot in the shoulder, causing a flesh wound, and then stabbed with a knife about twenty times. Six or seven of these stab wounds were to the front of her neck and upper chest. Another fourteen were to the back of her neck, near the base of her skull. In addition to the stab wounds this victim sustained several cuts to her hands and arms characterized as "defensive wounds." It is the context in which these wounds to Ms. McCoy-Ward were inflicted and were suffered that makes the killing one that is especially heinous, atrocious, or cruel. Both victims were probably shot at the same instant but Ms. McCoy-Ward's flesh wound was such that the defendant knew he had to do something more to her. Shooting her had not worked. So she was chased about the living room by the defendant while he stabbed her and while she attempted to deflect the knife with her hands. One or more of the stab wounds to the front of her neck and upper chest, though shallow, was fatal, causing her to bleed to death, but not immediately. Not before she made it to the locked front door of the house. This is where she collapsed to her knees as evidenced by her bloody handsmears all the way down the door to the floor. There, on her knees, she finally stopped struggling to save her own life. (after witnessing the shooting of Mr. Lawson) and it was there that the fourteen stab

> wounds were inflicted on the back of her neck, probably in an effort to sever her cervical spine. She was probably alive and possibly conscious at this time but she did not move again. Both victims died from rapid loss of blood. Ms. McCoy-Ward's blood was spattered throughout the living room. The horror of what she saw and heard and felt and thought in the last minute of her life is what makes her killing one that is particularly heinous, atrocious, and cruel. This aggravating factor was proved beyond a reasonable doubt. As to the killing of Mr. Lawson it was not.

(T2:332-33)

Appellant raises several challenges to the heinous, atrocious or cruel aggravating factor. The first is that the jury instruction is unconstitutionally vague in that its archaic terms render the instruction incomprehensible.

This claim is not only meritless but, is, also, procedurally barred. Despite his contention on appeal that the archaic terms render the instruction incomprehensible, the only instruction proposed by appellant to the court below relating to the heinous, atrocious or cruel aggravating factor instructed the jury that it must find that the victim was conscious after the first blows to support the finding that the murder was heinous, atrocious or cruel. (T2:242) In order to preserve a challenge to a jury instruction as vague, the objection at trial must attack the

instruction itself, either by submitting a limiting instruction or by making an objection to the instruction as worded. Crump v. State, 654 So.2d 545, 548 (Fla. 1995); Walls v. State, 641 So.2d 381, 387 (Fla. 1994), cert. denied, ___ U.S. ___, 115 S.Ct. 943, 130 L.Ed.2d 887 (1995) Since appellant did not propose an instruction that he agreed adequately conveyed the meanings of the terms, his claim is barred.[14]

Moreover, the instruction given to the jurors in the instant case mirrors the one upheld by this Court in Hall v. State, 614 So.2d 473 (Fla.), cert. denied, ___ U.S. ___, 114 S.Ct. 109, 126 L.Ed.2d 74 (1993). As this Court stated Hall, "the instruction defines the term sufficiently to save both the instruction and the aggravator from vagueness challenges." Id. at 478. Accord, Monlyn v. State, 705 So.2d 1, 6 (Fla. 1997); Geralds v. State, 674 So.2d 96 (Fla.), cert. denied, ___ U.S. ___, 117 S.Ct. 230, 136 L.Ed.2d 161 (1996); Merck v. State, 664 So.2d 939, 943 (Fla. 1995); Fennie v. State, 648 So.2d 95, 98 (Fla. 1994), cert. denied, 513 U.S. 1159 (1995).

Appellant's challenge to the application of this factor as inconsistent is also, without merit. Davis v. State, 648 So.2d

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[14] The record also reflects that when the jury requested an additional instruction on the term wicked, that appellant agreed with the definition provided by the court.. . (T11:1189-91)

107, 108-09 (Fla. 1994), cert. denied, 516 U.S. 827 (1995). As far as application of the heinous, atrocious or cruel aggravating factor to the instant facts, Appellee does not understand appellant to be complaining that the facts as found are wrong or unsupported by the evidence. Rather, Martinez argues that since the fact that Doug Lawson's murder was not found to be HAC, the finding with regard to Sherrie McCoy-Ward's murder is irrational. He also contends that since there was no evidence of premeditation, that the murders happened too quickly for any desire to inflict pain or torture to surface.

With regard to the court's determination that Lawson's murder was not heinous, atrocious or cruel, Lawson was shot several times. (T5:396-401) There is no evidence of him being stabbed or having a prolonged and violent struggle for his life. (T5:405) On the other hand the record reflects that Sherrie McCoy-Ward spent her last moments in a total fight to survive. (T5:407-10) The crime scene was a living room in which her blood was found from one end to another. One area had a blood splatter strewn across a T.V. screen while other areas had significant pooling. -53, 358) In fact, according to the crime scene testimony, some of the blood indicated a trail from Ms. McCoy-Ward to Douglas Lawson. (T5:369-70)

At the front door where she was found was the most significant blood pooling. Even more horrifying were the hand prints of Ms. McCoy Ward about five to 6 feet from the floor. These prints smeared all the way down the door to the spot where she was found on her knees in a corner. (T5:352) Those prints and smears define the final breaths of Sherrie McCoy-Ward and her ultimate loss in her battle to live.

Also what makes this so aggravating is the location in which this occurs. She and Mr. Lawson were slaughtered in the "security and sanctity" of their own home. It was apparent that they both were relaxing and getting ready for dinner since they were both dressed casually, had no shoes on, and dinner was still on the stove. (T5:352-53, 362) They both apparently thought of the defendant as a friend given the fact that the rottweiler dogs were found locked in an upstairs bedroom. (T5:360)

However, more telling than anything about the vicious nature of this attack is the body of Sherrie McCoy-Ward. She was shot one time in the shoulder. (T5:405) It was a flesh wound that was non-fatal, would not result in a loss of consciousness, and from which Ms. McCoy-Ward would feel pain. This nature of the scene and gunshot wounds to Mr. Lawson would suggest that this was the first injury to her. But, that was just a simple beginning.

The remainder of her injuries were stab wounds. The Associate Medical Examiner testified that they were grouped in three basic areas: the front chest/neck, the upper back and neck, and the arms and hands. Dr. Miller further testified that none of these wounds were immediately fatal, in fact many were non-lethal. These stabs also would not result in an immediate loss of consciousness. Ms. McCoy-Ward would likely have survived and been aware of what was happening to her for about five minutes. (T5:409-12)

Many of the wounds were to her front, neck, and chest. As she was fighting to live, she had to look at her attacker, appellant, who she thought was a friend. He stabbed her repeatedly with some of the wounds hitting their mark by puncturing her lungs. She then began to bleed into her lungs causing her to choke or begin to drown in her own blood. (T5:394)

Several of the wounds were to her upper back and neck. These appeared to be the final wounds as Sherrie apparently ran for the door as she tried to get away from appellant. As she ran to the door and slowly fell to her knees, appellant kept up his attack, burying the knife into her another 14 times. Again, as Dr. Miller said, she was alive for each of these stabs. Dr. Miller also indicated that there were "defensive wounds." Many of the hand wounds were consistent with her grabbing a knife as she struggled

to stop the attack. (T5:407) The pain Sherrie suffered, the amount of time it took to do this to her, and the knowledge she had of her impending death supports the trial court's finding of heinous, atrocious, or cruel beyond any reasonable doubt.

In Hitchcock v. State, 578 So.2d 693 (Fla. 1990), cert. denied, 502 U.S. 912 (1991), this Court found that even if the defendant might not have intended the death to be unnecessarily tortuous, it does not mean that it is not heinous, atrocious, and cruel. While the State is not conceding that Martinez did not intend this, the fear and emotional distress to Sherrie McCoy-Ward must have been incredible. As the Hitchcock Court found, this aggravator pertains more to the perception of the victim than to the perpetrator. Given that, this aggravator is clearly established for Sherrie's murder.

Moreover, this Court has consistently held a murder to be heinous, atrocious, or cruel when the victim was repeatedly stabbed. Henry v. State, 649 So.2d 1366 (Fla. 1994), cert. denied, 515 U.S. 1148 (1995); Derrick v. State, 641 So.2d 378 (Fla. 1994), cert. denied, 513 U.S. 1130 (1995); Floyd v. State, 569 So.2d 1225 (Fla. 1990), cert. denied, 501 U.S. 1259 (1991); Haliburton v. State, 561 So.2d 248 (Fla. 1990), cert. denied, 501 U.S. 1259 (1991) and Nibert v. State, 508 So.2d 1 (Fla. 1987) In Nibert, the

victim was stabbed seventeen times by the defendant who had entered the victim's home with the intent to rob him. The evidence established that of the seventeen stab wounds, several were defensive wounds, and the victim remained conscious during the attack. This Court found that those facts supported a finding of HAC. See, also, Mahn v. State, 714 So.2d 391 (Fla. 1998); Williamson v. State, 681 So.2d 688, 698 (Fla. 1996), cert. denied, 520 U.S. 1200 (1997); Barwick v. State, 660 So.2d 685, 696 (Fla. 1995), cert. denied, 516 U.S. 1097 (1996); Pittman v. State, 646 So.2d 167, 173 (Fla. 1994), cert. denied, 514 U.S. 1119 (1995); Campbell v. State, 571 So.2d 415 (Fla. 1990); Hardwick v. State, 521 So.2d 1071, 1076 (Fla.), cert. denied, 488 U.S. 871 (1988); Johnston v. State, 497 So.2d 863, 871 (Fla. 1986) As the facts in this case are comparable to those in Nibert and the stabbing cases cited above, the finding by the lower court should be affirmed.

ISSUE IX

WHETHER THE SENTENCE IN THE INSTANT CASE IS PROPORTIONATE.

Upon imposing the sentence in the instant case, the trial court found three aggravating circumstances, 1)prior violent felony (contemporaneous homicide of Douglas Lawson), 2) during the course of a burglary and, 3) heinous, atrocious or cruel. In mitigation the court found no significant criminal history; family background as child; parent and husband; nonstatutory mental; problems from car accident in 1994, including depression, disorientation, etc.; work history; aversion to violence; adjusted well to prison, involved in education and religion there; family will visit in prison; above average intelligence and no sociopathic/psychotic tendencies. The court designated moderate weight to some and little weight to other mitigating factors. (T2:331-336) The jury recommended death by a vote of 9-3 that the defendant be sentenced to death for the murder of Sherrie McCoy-Ward and the court followed that recommendation. (T2:245)

Appellant now contends that the sentence is disproportionate and should be reduced to life. He contends that this is so because there were no eyewitnesses to the crime and no physical evidence linking the defendant to the crime. It is the state's contention that given the existence of a valid judgment of guilt that is

supported by sufficient evidence and aggravated by the circumstance present in the instant case balanced against the insignificant mitigating evidence presented herein that the trial court properly sentenced appellant to death. Proportionality is not a recounting of aggravating versus mitigating but, rather, compares the case to similar defendants, facts and sentences. Tillman v. State, 591 So.2d 167 (Fla. 1991) A review of similar cases compared to the facts of the instant case shows that Martinez's sentence is proportionate.

In Williamson v. State, 681 So.2d 688, 694 (Fla. 1996), cert. denied, 520 U.S. 1200 (1997), the victim had been stabbed repeatedly and her husband, child and father-in-law had been shot by a family friend committing a robbery. This Court upheld the sentence as proportionate, where, as in the instant case, the judge found three aggravating circumstances: (1) prior violent felony; (2) during the commission of a burglary, robbery, or kidnapping; and (3) heinous, atrocious, or cruel balanced against a number of nonstatutory mitigating factors.

Similarly, in Finney v. State, 660 So.2d 674, 679 (Fla.), cert. denied, 516 U.S. 1096 (1995) this Court upheld the sentence imposed for the stabbing death of a young woman where the court found three aggravating factors: 1) prior violent felony; 2)

pecuniary gain; and 3) the murder was especially heinous, atrocious or cruel balanced against five nonstatutory mitigating factors: 1) Finney's contributions to the community as evidenced by his work and military history; 2) Finney's positive character traits; 3) Finney would adjust well to a prison setting and had potential for rehabilitation; 4) Finney had a deprived childhood; and 5) Finney's bonding with and love for his daughter. This Court held that after comparing the case to other death penalty cases, e.g., Hudson v. State, 538 So.2d 829 (Fla.), cert. denied, 493 U.S. 875 (1989) that death was proportionately warranted. Finney at 685.

As for appellant's argument that these murders may have been the result of a debt collection gone bad, the circumstances of this case are distinguishable from those cases where this Court has rejected the death sentence on that basis. In Mendoza v. State, 700 So.2d 670, 679 (Fla. 1997), this Court rejected a similar argument stating:

> Appellant cites three robbery-murder cases to support his contention that this crime does not warrant the death penalty because the murder was not planned but was committed on the spur of the moment during a robbery gone awry. See Terry v. State, 668 So.2d 954 (Fla.1996); Jackson v. State, 575 So.2d 181 (Fla.1991); Livingston v. State, 565 So.2d 1288 (Fla.1988) We find no merit in this argument. In Terry and Jackson, as in

> this case, the trial court found two aggravating circumstances and no mitigating circumstances in imposing the death penalty. In both of those cases, we vacated the death sentences on proportionality grounds. However, in Terry and Jackson, the trial courts based prior-violent-felony aggravating circumstances upon armed robberies which were contemporaneous with the murders. By contrast, the trial court in this case based the prior-violent-felony circumstance upon appellant's previous armed robbery conviction in the Robert Street case. Thus, appellant's prior conviction of an entirely separate violent crime differs from the aggravation found in Terry and Jackson. In Livingston, the trial court found two mitigating circumstances: Livingston's age. (seventeen years) and Livingston's unfortunate home life and upbringing. By contrast, appellant was twenty-five years old at the time of this murder, and the trial court considered but found no mitigation in the form of appellant's history of drug use and mental problems. Therefore, under the circumstances of this case, the death penalty is not disproportionate.

Mendoza v. State, 700 So.2d 670, 679 (Fla. 1997)

Further, appellant’s contention that the sentence is disproportionate because there were no eyewitnesses to the crime and no physical evidence linking the defendant to the crime is tantamount to a lingering doubt argument. Residual or lingering doubt of guilt is not an appropriate mitigating circumstance in sentencing phase of capital case and is not a valid basis in Florida for challenging a sentence of death. Sims v. State, 681

So.2d 1112 (Fla. 1996); Bogle v. State, 655 So.2d 1103, 1107 (Fla.), cert. denied, 516 U.S. 978 (1995); Downs v. State, 572 So.2d 895, 900 (Fla. 1990), cert. denied, 502 U.S. 829, 112 S.Ct. 101, 116 L.Ed.2d 72 (1991); Aldridge v. State, 503 So.2d 1257, 1259 (Fla. 1987) Moreover, there is direct evidence of appellant's guilt as he made many inculpatory statements claiming responsibility for the crime.

Based on the foregoing, the state urges this Court to affirm the judgment and sentence in the instant case.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Peter Raben, Esquire, 2665 South Bayshore Drive, Suite 1206, Coconut Grove, Florida, 33133; and Sharon L. Kegerreis, Esq., Hughes, Hubbard & Reed, LLP, 201 S. Biscayne Blvd., Miami Center, Suite 2500, Miami, Florida 33131, this 14th day of May, 1999.

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