IN THE SUPREME COURT OF FLORIDA

PAUL FITZPATRICK,

Appellant,

v. **CASE NO. SC00-2589**

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE TENTH JUDICIAL CIRCUIT,
IN AND FOR PASCO COUNTY, FLORIDA

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

GUILT PHASE

Post Office carrier Robert Hill testified that in February of 1980 his route included 529 Ponce de Leon Boulevard, Belleair, Pinellas County, the residence of Gerald Hollinger. When he delivered the mail there on February 8 the mailbox was full including a folded newspaper like he had delivered in the past. Hill became concerned, noticed red footprints on the ground, stepped on the stoop a couple of steps. When he looked through the kitchen door he saw a body and ran across the street (R9, 30-33). He identified photographs of the house (R9, 34-35). Hill was present when law enforcement arrived and talked to two detectives (R9, 37).

Salvatore Gesauldo was a patrol officer for the Belleair Police Department on February 8, 1980, and responded to the Hollinger residence. Mailman Hill told him what he saw. Gesauldo observed footprints near the doorway and saw the body. The witness called his supervisor Sgt. Bland and they observed that all the doors were secured and the garage door was closed (R9, 40-41). Sgt. Bland broke the front door glass pane and they entered the house. After first determining that there was no living person there, they observed bloody footprints on the living room floor. They did not step in those prints. Some of the lights were on(R9, 42). Inside the residence there appeared

to be some type of markings inconsistent with a foot impression and appeared to be more shoe-like (R9, 48). Photos depicted what appeared to be someone with blood on their feet having walked across the rug, and a bloody dollar bill on the floor (R9, 58-59). There were blood stains in the bathroom sink, on the rug and on the door (R9, 61). He did not touch Hollinger's body at all. In the kitchen area was a checkbook, wallet and credit card and underneath the cabinet was a knife (R9, 62). During the course of the investigation it was determined that certain pieces of stereo equipment were taken (R9, 63).

John Yaitanes, Chief of Police in Bellaire at the time, arrived at the scene and found a hotel receipt in the residence on the coffee table in the living room. (R9, 68-70). The receipt was from the Floridian Motor Hotel, listing John Murphy, room number 1706 and the bill totaled $74.20 for the room from February 2 thru February 8, 1980 (R9, 71). Crime scene technician Martin McLeod arrived at the crime scene at about 11:22 a.m. on February 8 and processed the scene (R9, 76-77). In the kitchen where the victim's body lay was a wallet, butcher knife with the blade bent, checkbook, cigarette pack and bloody shoe prints (R9, 80). He followed the bloody footprints that entered into the garage. They had star impressions and circles and the initials said Great American Shoe Store. The prints stopped and it appeared that a person might have gotten into a

car at that point. There were bloody sock prints that led from the kitchen across the living room, down the hallway into the master bedroom and bathroom (R9, 81). There was blood on the inside of the kitchen door, on the sliding doors of the hallway closet, on the door leading into the bathroom and on the vanity and bathtub. There was a small amount of blood on a gray metal file box in the closet (R9, 82). Along with technician Miller photographs were taken of the victim's wounds and they took arm prints and knee prints. He took for processing the kitchen knife, wallet and credit card and Marlboro cigarette pack (R9, 83). On February 13, he went to the Floridian Hotel in Tampa because the receipt found in the victim's home listed that hotel and room number and processed that scene (R9, 85). On the 14th he received plucked pubic and head hairs from Chuck Weinel (a slip of paper with his name had been found in the victim's wallet) (R9, 84, 86). On the kitchen knife, the blade was bent and the tip of the blade was missing (R9, 88). The items retrieved from the murder scene were introduced into evidence as well as the evidence obtained in the motel room. (R9, 87-98). The prints he lifted from both the murder scene and the Floridian Hotel were subsequently compared by Technician Brommelsick (R9, 98).

Crime scene technician Sharon Rothwell testified that she processed the stolen 1979 Cadillac Eldorado at the Courtney Campbell Causeway in Pinellas County on February 8 at about 3:30

or 4:00 (R9, 109). She took photographs and processed and collected any type of evidence she could (R9, 112). Papers in the glove compartment identified the vehicle as owned by Gerald Hollinger (R9, 115). The vehicle was unlocked when she arrived at the scene and she did not find a key for it (R9, 119).

Charles Miller of the Pinellas County Sheriff's Office went to the homicide scene on February 8, took photographs and processed the scene for prints. There were sneaker prints outside the kitchen door and inside the garage (R9, 133). He lifted a print from a glass on the living room coffee table and from the Jack Daniels bottle (R9, 135-136). He lifted prints from a glass in the bedroom and from the bathroom door in the master bedroom (R9, 137). Henry Brommelsick, an expert in latent fingerprint analysis testified that he had the known fingerprints of appellant Fitzpatrick, Paul Brown, Richard Fairley, Mr. Culbreth and the victim Mr. Hollinger (R9, 149). He explained that everybody does not leave fingerprints no matter what they touch because they are non-exuders who don't sweat (R9, 151). Of the 257 lifts that he looked at, 197 came from the victim's residence, 23 from the victim's motor vehicle and about 37 from the motel or hotel in Tampa. (R9, 155). Ten prints came back positive to appellant, seven from the murder scene, one from the victim's stolen vehicle, and two from the motel. Two prints of Mr. Brown were found, from the motel.

Seven prints came back of Mr. Fairley (four in the residence and three in the vehicle) and four from Culbreth in the residence. Victim Hollinger had 28 prints lifted (R9, 156-157). A comparison was made with Weinel's known prints and none came up positive (R9, 158). Fitzpatrick's prints were found on the glass in the living room, the glass from the bedroom, from the bathroom door, the outside passenger's frame of door, the ashtray on the dresser in motel room 1706 (R9, 158-165). Paul Brown 's two prints were found in the Tampa motel room and Fairley had four prints at the residence and three from the motor vehicle (R9, 166-67). Four prints came back from Mr. Culbreth (R9, 168). Other prints found had no value. Fitzpatrick had prints from three fingers from his left hand and one from his right hand on the glass on the coffee table, right hand prints on a glass in the bedroom and left middle finger print on the bathroom door (R9, 184).

Medical Examiner Dr. Joan Wood testified that the autopsy was performed in this case by Dr. Shinner who was now deceased, but that she had reviewed the various reports and photographs. She counted forty-one knife wounds (leaving out the several wounds about the left ear) (R10, 189-194). There was an incised wound on the bridge of the nose, a wound involving the corner of the right eye which had caused the right globe or eyeball to partially collapse, rendering the victim blind in that eye (R10,

196). The lowest wound on the side of the neck is associated with cutting into the right jugular vein, causing very rapid bleeding (not the spurting bleeding associated with an artery). There was a pattern of very superficial marks on the skin, consistent with pressure from the knife blade against the skin but without any cutting action occurring. (R10, 198). It was consistent with someone behind Hollinger and holding a knife to his throat. There were superficial cutting wounds to the shoulder, a stab wound to the neck one inch deep. The left hand had a through and through defensive stab wound and a second similar stab wound on the back of the left hand (R10, 198-199). There were a number of superficial cut marks on the back, consistent with the person being down on the ground and not moving when they were inflicted. There were two defensive wounds on Hollinger's right leg and the shin bone would be an area where the knife blade could have been bent (R10, 200-201). Part of the blood was transferred on to his clothing as the body was rolled over. Hollinger's wallet was displayed in the photo lying on top of the blood. The blood on the victim's socks also were indicative of the body being rolled over (R10, 202). It appeared that the initial injury began by the counter where the sandwich was; there was blood dripping straight down on the stove. Blood on the refrigerator traveled from right to left and upward slightly (R10, 205). The autopsy was performed on

February 8; the potassium level in the eye was 19 indicating that the victim had been dead more than 12, probably more than 18 hours. This was consistent with the victim being killed at midnight or the early hours of February 8 (R10, 206-207). Mr. Hollinger was 6'4'', weighed 230 pounds and was in relatively good physical condition (R10, 211). The only wound that the victim had that would have by itself been certain to have caused death was the jugular vein wound. The immediate cause of death was blood loss contributed to by all the wounds (R10, 212). Hollinger 's blood had some level of alcohol but below the DUI level. Acid phosphatase tests to determine the presence of semen (for possible sexual molestation) were negative. (R10, 213). All the wounds were consistent with state Exhibit 9 (R10, 215).

Kenneth Menard has lived in Revere, Massachusetts, just north of Boston since 1961 (R10, 219). A couple of years prior to 1980 he had contact with Paul Brown offering money in return for sexual services and that relationship continued on and off for next several years. In January of 1980 he agreed to let Paul Brown stay at his house temporarily (R10, 221). He gave Brown a key (R10, 222). The court instructed the jury that they were to consider the evidence they were about to hear only for the limited purpose of proving identity, motive, intent, modus operandi on the part of the defendant (R10, 222-223). Menard

was home on the evening of January 29 into the morning hours of January 30, 1980. Brown phoned him and asked if he could bring a friend Paul Fitzpatrick with him to the house. Menard reluctantly agreed and went back to bed. At 2:15 a.m. he heard someone enter with a key. He recognized Brown's voice, assumed the other male was Fitzpatrick and there were two girls with them (R10, 224). Brown came into his room, Menard heard him pick up Menard's car keys. Menard told him to give the keys back and took them away from Brown. One of the girls kept phoning for a cab but giving the wrong address. Menard gave the correct address and the girls left about 4:30 a.m. He heard Brown mention to Fitzpatrick, you want to rob this guy? And Fitzpatrick responded he is your uncle, isn't he? Brown answered, no, he is a fag that picked me up. Menard heard rummaging in the kitchen, like the silverware drawer(R10, 226-228). Menard saw Fitzpatrick reach up and slash the drapery cords. Led by Fitzpatrick the two men came into the room and started to tie him up with the drapery cord. Menard began struggling, Fitzpatrick said he had a knife and if you move I'll slice you wide open. Menard at first felt appellant's thumb, then the knife at his throat. Fitzpatrick didn't like the fact that Brown had tied Menard's hands in front of him and wanted them tied behind him. Fitzpatrick gave the knife to Brown, put it against the side of Menard's throat and told Brown that if

Menard moved to push it right through. Fitzpatrick got behind and tied the victim's hands behind him (R10, 229). They removed a wallet, a ring and a gold neck chain, took cash and credit cards from the wallet. Fitzpatrick wanted to know where the rest of the cash was and when told he didn't keep cash in the house Fitzpatrick responded that he was going to look for it and if he found it he was going to kill him. Menard didn't understand how Fitzpatrick could be so angry at him since he didn't know him (R10, 230). The car keys were in his pocket and they were removed. Menard had a 1975 or 1976 Pacer and stereo equipment. He remained tied up while they were there for up to two hours (R10, 231). Menard mentioned to Brown that there were people who knew that he was staying at the house (loudly for Fitzpatrick's benefit). Fitzpatrick said if that guy doesn't shut up, I'm going to kill him (R10, 232). Fitzpatrick told Brown to take the stereo equipment out to the car. Fitzpatrick untied his feet to take Menard's slacks (the only pair that he saw he liked). Fitzpatrick ripped the phones out of the wall and they left. Fitzpatrick had not retied his feet. Somehow Menard managed to put on another pair of slacks, left the residence, went to a neighbor's house, told her what had happened and called the police (R10, 233-234). Checks were taken from his home and one was cashed or deposited. Two credit cards were used to purchase things. The stereo equipment was

not recovered and the auto was recovered in Rhode Island, south of Massachusetts two weeks later. Fitzpatrick was able to wear his size 32 pants (R10, 235-237). On cross-examination he testified that Fitzpatrick had been at his house on another night with Brown before this incident. Menard met Fitzpatrick when Brown told him that Fitzpatrick would bail him out of jail if Menard gave Fitzpatrick the money. Subsequently he learned where Fitzpatrick lived from Brown (R10, 241-242).

Detective Michael Ring of the Pinellas County Sheriff's Office was asked to assist in reopening the unsolved Hollinger case in 1994 (R10, 251). On a card for room 1706, that was identified from the Floridian Motel Inn, there was a social security number. Ring learned that number had not been issued by the Social Security Administration. The name on the card was Paul Curry. Ring could not find that Paul Curry had ever been issued a Social Security number. (R10, 252-54). Ring had prior law enforcement experience in Massachusetts and he recalled that the first three digits of the Social Security number indicate where the card is issued and here the digits would indicate that it would have been issued in Massachusetts if it was a valid number (R10, 255). Ring requested that the fingerprints previously recovered at the murder scene, car and motel be checked with Massachusetts. Ring became aware of Paul Brown and an associate of his, Paul Fitzpatrick. Ring learned that Paul

Brown's fingerprint was found in motel room 1706. He and Detective Klein went to Boston in an attempt to locate and interview Brown and Fitzpatrick (R10, 256-57). He obtained a search warrant for fingerprints, footprints and hairs of Fitzpatrick and Brown. Brown was located in Bedford, Massachusetts and interviewed. Ring showed Brown a picture depicting a pair of shoes that were located in the Floridian Motel (R10, 257-58). Fitzpatrick was located in Everett, Massachusetts. The officers had not told Brown how Hollinger was killed or that he was homosexual, or that he had sustained an injury to his throat. He did not make mention of bloody footprints (R10, 258-260). Ring interviewed Fitzpatrick and at the conclusion executed the search warrant (R10, 260). Exhibit 30 were the footprints of Fitzpatrick and Exhibit 31 were the footprints of Paul Brown (R10, 262). During his investigation Ring also contacted Charles Weinel and took inked impressions of his feet (Exhibit 33) and obtained inked foot impressions of Richard Fairley (Exhibit 32) (R10, 263-266). The witness also explained that the hairs collected from Fitzpatrick and Brown in 1995 could not be meaningfully compared to the hairs found in 1980 because the composition of hair changes over time and would not be microscopically similar. There were no root balls on any of the hairs from 1980 for DNA analysis. Ring interviewed Fitzpatrick on June 20, 1995, at the Everett police station

(R10, 267). Appellant was willing to come to the police department for the interview. No promises or threats were made; there was no coercion and Fitzpatrick was free to leave at any time. He was not under arrest (R10, 268-69). Fitzpatrick admitted that he smoked cigarettes and that he smoked Marlboro or Salems. Appellant admitted knowing Paul Brown in 1980, that they were lifelong friends and had grown up in the Somerville/Medford area (R10, 270-71). They discussed the incident with Menard and Fitzpatrick basically indicated that it was Paul Brown's idea, that he was there and helped load up the car and drove away in the stolen car. Fitzpatrick claimed that Brown was the one armed with the knife (R10, 272). When asked if he had ever been to Florida, appellant responded that he had been to Disneyland. Appellant denied having been west of Orlando in the Tampa Bay area in the cities mentioned by Ring (R10, 273). Fitzpatrick said he had not been to Florida at any time with Paul Brown (Ring knew that Brown and Fitzpatrick's fingerprints had been found in room 1706 at the Floridian Motel)(R10, 274). Ring confronted him with the fact that his prints were at the motel, on the victim's car and inside the victim's residence. He produced the fingerprint report, showed it to him and asked if he would like to look at it. Appellant glanced at it. When asked if he thought this was a fake document, his response was that he thought it was not. At the

beginning of the interview appellant was very calm, polite, but his demeanor changed when the questions related to Florida, Pinellas County and fingerprints; he started to sweat profusely (R10, 275-76). He also started to belch little burps. Eventually Fitzpatrick left the police department (R10, 276). Ring specifically asked him if he had been to Clearwater and Belleair and Tampa and he responded that he hadn't (R10, 278).

Paul Brown testified that he grew up on Somerville, Massachusetts on the outskirts of Boston and was a friend of appellant Fitzpatrick (R10, 289-290). Brown admitted that he met Ken Menard, had sexual relations with him and that Menard let him stay with him and that Menard let him stay in his house in January of 1980 (R10, 292). Brown testified that Menard told him it would be alright to bring his friend Fitzpatrick over for the weekend (R10, 295-296). He and appellant had limited funds at the time (R10, 296). Appellant and Brown were at the Menard residence partying with two girls and they realized Menard was still in the house. Menard refused permission to use his car to take the girls home. After the girls left, appellant grabbed a knife out of the kitchen drawer. They were both mad at Menard for obstructing their effort to have sex with the girls (R10, 297-300). They cut cords drapes from the curtains, went into Menard's Bedroom and tied him up (R10, 300-01). Menard was tied up and they took his car keys

and $4,000 stereo system along with a watch and possibly some cash (R10, 302-03). Fitzpatrick cut the wire to the phone, sold the stolen stereo equipment for $400-500, and stayed at his sister-in-law's house (R10, 303-04).

Later, they took Menard's car and headed to Florida. Menard knew both Brown and Fitzpatrick and could easily identify them as having robbed him (R10, 305). They had about $500-600 with them (R10, 305). They didn't get far in the Menard vehicle due to an auto accident; his sister-in-law picked them up. They spent some of the money on alcohol and drugs and then decided to take a bus from Massachusetts to Florida. After buying the bus tickets, they had about $300 (R10, 307-308). They arrived in Clearwater with $150-200 and stayed at the Floridian Motel in Tampa and paid a week in advance ($75), leaving them about a hundred dollars (R10, 309). They didn't register using their real names; Brown used a name he had previously used Jim Curry and appellant also used a fake name. They stayed in Room 1706 (R10, 310-311) and went partying every night in Clearwater (R10, 311). The first time they traveled to Clearwater by bus, but afterwards they would steal a car to go back and forth, using the limited funds for drugs and partying (R10, 312). Brown was with appellant every day except one when they split up during a party at a hotel (R10, 314-315). Brown stayed at the party and Fitzpatrick left. Brown stole a van to return to the Tampa

motel; Fitzpatrick later returned and his shoes were covered with mud. At Fitzpatrick's request, he gave a ring to the man with appellant who apparently had given him a ride (R10, 318-319).

Later, he saw Fitzpatrick throwing his shoes out the window; appellant said he had ripped one (R10, 321). Since they were getting low on cash, they arranged for Brown's aunt to pick them up and they stayed with her girlfriend (R10, 322). They still had one night paid up for the motel, but they didn't stay (R10, 324). Three weeks later they returned to Boston via bus (R10, 327). Subsequently they were arrested for the Menard robbery, pled guilty and served time in prison at Billerica House of Corrections (R10, 329-330). While talking with other inmates, appellant mentioned that if attacked in the cell he would "slice his throat like I did in Florida" (R10, 331). When Brown asked him what he meant, Fitzpatrick said a homosexual male attacked him and he stabbed and slit his throat in Florida (R10, 332). When interviewed by law enforcement officers in 1995, Brown agreed to talk to Sergeant Ring (R10, 334). He first denied having been in Florida and with Fitzpatrick (R10, 335-336). When told they had fingerprints, Brown admitted being in Florida and they discussed the Menard incident (R10, 337-338). Brown told them he and Fitzpatrick were on the run from the Menard case (R10, 339). Several months later, Brown got arrested by

Trooper Benoit for DUI (R10, 342) and he gave additional information to Benoit (R10, 343-345). He told Benoit that appellant threw away his shoes (R10, 346) and the substance on the shoes appeared to be blood (R10, 347).

Brown was reinterviewed by Ring in March and September of 1986 and he was concerned he might be deemed some sort of an accessory to murder (R10, 350).

On cross-examination, Brown acknowledged initially being untruthful to Detective Ring (R11, 385), that he was concerned about his fingerprint at the Floridian Motel (R11, 390), that he was on a drinking and drugs binge for months after his interview (R11, 391). He admitted that he could get a state prison sentence for a fourth DUI conviction (R11, 394). Brown admitted having sex with Menard (R11, 397) and that they were friends (R11, 400). They stole a bunch of vans while in Florida and pawned what they took from the vans (R11, 410). Brown knew how to steal vans, not Fitzpatrick (R11, 411). Brown testified that he and appellant could never trade clothes - Fitzpatrick was bigger (R11, 441).

On redirect Brown denied killing Gerald Hollinger or knowing who he was (R11, 453). He has been an alcoholic for a good part of his life (R11, 456). He also did not want to take the rap for someone else and seized on the opportunity to talk with Benoit after a friend showed up at the VA shelter where Brown

was staying and mentioned hearing that he and Fitzpatrick were involved in a murder (R11, 464). He did not put the state Exhibit 18 (motel receipt) in the residence of Hollinger (R11, 471). On recross, he admitted using drugs and alcohol before getting out of the VA Hospital (R11, 473).

William Bodziak, admitted as an expert in the forensic examination of documents and barefoot impressions (R11, 480), explained the four types of impressions when someone walks around without shoes: naked foot impression, naked foot impression in a soil or liquid where the fluid doesn't retain crisp detail, impression by a foot covered with a sock, and an impression left on the inside of a shoe (R11, 481). He was able to make comparisons in the last three categories. In this case, while he was with the FBI he was provided three rugs from the Pinellas County Sheriff's office (R11, 490). On the rugs and photographs of the crime scene were both shoe prints and sock-clad or possibly barefoot impressions. He was asked to compare these to impressions of four individuals whose known exemplars were also submitted to him (R11, 491). The known inked impressions that were submitted to him included those of Paul Fitzpatrick, Richard Fairley, Charles Weinel and Paul Brown (R11, 499). State Exhibit 35 was the left foot impressions of Fitzpatrick (k1), Fairley (k3), Weinel (k5), and Brown (k7) (R11, 501).

He determined that the shoe was a Converse All Star type of design made in the 1970's. The entire design is made up of small stars and parallel bars from the heel of the shoe to the toe (R11, 517). The witness opined that as to the Exhibit 13 (black and white carpet) and the Exhibit 14 (orange rug) he could exclude Weinel, Brown and Fairley, but the impressions were consistent with those of Fitzpatrick (R11, 524-528). Fitzpatrick shared characteristics with the impressions from the crime scene and the combination of all the characteristics could be included as the possible maker of these shoe prints (R11, 529). He could not tell if the sock-clad or bare-foot impressions were made by the same person that made the shoe impressions (R11, 535). In reference to Exhibit 37, there was nothing inconsistent with Fitzpatrick’s foot impression between the inked and the ones that luminesce and blood on the carpet found at the murder scene (R11, 541). As to Exhibit 14, there was nothing inconsistent between the inked impression of Fitzpatrick and the bloody sock impressions found in the house of victim Hollinger (R11, 544).

The defense moved for a judgment of acquittal, urging that the state had failed to prove the homicide was committed with premeditated intent, that as to felony-murder the taking of property occurred after the murder to preclude robbery as the underlying felony, and that as to the burglary for the

underlying offense there was circumstantial evidence consistent with both consensual and non-consensual behavior. After hearing argument the trial court denied the motions. (R12, 553-571). Appellant Fitzpatrick testified on his own behalf (R12, 578-650). He was twenty-two years old at the time of this homicide in 1980, and had grown up in the same area or neighborhood as Paul Brown. On the night of the Menard incident they were partying with two girls at a disco club and when it closed Brown invited them to his house (R12, 578-80). Fitzpatrick thought that Menard was Paul's uncle. Brown had a conversation with Menard; the latter told him that the girls had to leave (R12, 582). Appellant claimed Brown was mad and a cab was called to take the girls home (R12, 583-84). They entered the Menard's bedroom by two different doors. Brown had a knife in his hand (R12, 586). Fitzpatrick claimed to be nervous and Brown suggested killing the man. He took the knife from Brown, cut the cords on the bedroom Venetian blind and started to tie up Menard so that he would not get out of bed (R12, 587-88). Brown was ransacking the room. Brown apologized to Menard, telling him he didn't know what was going on and that he didn't mean to be doing this (R12, 590). Fitzpatrick helped Brown take the stereo speakers from the house down to Menard's car and they left in it. (R12, 591-92). Brown came up with the idea to flee to Florida and they stayed at a hotel in Tampa, drinking every

day and staying up late at night at a disco club in Clearwater (R12, 594). They started to thumb a ride back to Tampa when they were picked up by victim Gerald Hollinger (R12, 596). Hollinger told them it was a long ride to Tampa, that he had to stop at his house first. Hollinger offered them drinks when they got to the house (R12, 597). Fitzpatrick testified that Hollinger invited them inside and they had drinks (R12, 598). Fitzpatrick fell asleep sitting on the couch and woke up to some yelling and screaming. He got up, looked in the kitchen area and saw Brown and Hollinger fighting (R12, 599). After Brown walked by him into another room, Fitzpatrick claimed that he walked into the kitchen area and looked at the man who appeared to be dead. There was blood in the area and he stepped in it in his socks (R12, 601). Brown was washing up in the bathroom, Fitzpatrick took off his socks and put on his brown leather dress shoes and the two of them took the victim's stereo and his car. They ran out of gas, left the car and were picked up by a truck driver. They got another ride (still carrying the stolen stereo equipment) and returned to the hotel (R12, 601-06). They stayed with Brown's aunt's girl friend in a trailer park for three weeks and eventually returned to Massachusetts. They sold the stereo and bought two bus tickets (R12, 607). There was a warrant out for him on the Menard incident and he turned himself in. At some point he was in prison with Paul Brown but denied

telling him that he slit some guy's throat, claimed he did not discuss the incident with Brown again, or threaten him or have others threaten Brown (R12, 609-610).

On cross-examination, Fitzpatrick admitted knowing that Menard had befriended Brown by letting him stay at his place and giving him money to bond out of jail, and giving the money to Fitzpatrick; that is how Menard knew appellant (R12, 610-611). Appellant denied placing the knife against Menard's throat, or threatening to kill him, or threatening to slit his throat wide open (R12, 613). Appellant admitted taking some cash, jewelry, car keys and car from Menard. Fitzpatrick had two prior convictions that he knew of (R12, 614). He claimed that when he was interviewed by Mr. Ring in June of 1995 he did not recall being asked if he had been in the St. Petersburg/Clearwater area; when he asked about a specific area, Fitzpatrick claimed he wanted to talk to an attorney. He didn't remember Ring asking if he had been in Florida with Mr. Brown or if he had been in a motel in Tampa, or about staying at a residence in the Clearwater/Belleair area (R12, 615-16). He didn't remember Ring showing him a report and saying I've got your fingerprints and denied having thrown the report back at Ring (R12, 616-17). Appellant reiterated that he went to the Hollinger residence with Brown, that his fingerprints were on the glass in the residence (R12, 618). Fitzpatrick insisted that Brown was in

the kitchen and walked through the parlor area, the living room area to the bathroom where he washed up (R12, 623). Appellant admitted that his fingerprint was on the bathroom door (R12, 624). He admitted that the bloody footprints were his that were depicted in State's Exhibit 3, F, G, H, I, and J (R12, 625). As far as he knew, those sock impressions were his (R12, 626). He didn't remember whether Hollinger was rolled over and his wallet taken but claimed he didn't do so (R12, 627). He didn't recall where he took his socks off (R12, 628). He denied stealing the victim's car, but acknowledged helping another take the stereo equipment, load it in the car and drive away from the residence. He claimed that he and another abandoned the stolen Hollinger car. He admitted that he and Brown were on the run from law enforcement and that they were getting down on funds (R12, 629-30). He wasn't working while in the Florida area and the only person he knew here was Brown. He had no source of income (R12, 630-31). The money he had brought with him he used on motel, drinks and drugs while out at Clearwater Beach. He left his job in Boston after robbing Menard (R12, 631). Appellant maintained that in the Menard incident it was Brown who had the knife and was wielding it and cutting Menard. He had no idea why Brown allegedly attacked Hollinger (R12, 635). Hollinger had no weapons in his hands at the time (R12, 637). The jury returned a verdict of guilty of murder in the first degree (R5, 819).

PENALTY PHASE

The state introduced Exhibit 1 stipulation regarding appellant's prior violent felony conviction (R14, 882). Defense witness Joseph McCain, a private investigator and former policeman, testified that crime was prevalent from 1970 to 1980 in the Somerville area and children growing up in that neighborhood would be exposed to violence (R14, 883-887). They learned about the code of silence and organized crime (R14, 888). On cross-examination the witness conceded that he had had no contact with appellant or his family members and had no idea who the family was (R14, 892).

Margaret Fitzpatrick, the mother of five children including the forty-one year old appellant, testified that her husband had a heart attack at age thirty-four and all the kids worked in a variety store. Appellant's brother Michael has a bad heart and Downs' Syndrome (R14, 893-895). Appellant helped care for him when Michael was an infant. Michael could not come down and testify because he has only one kidney and rheumatoid arthritis and has not been told of appellant's situation (R14, 895-896). A videotape of Michael Fitzpatrick was played to the jury (R14, 897-910). Mrs. Fitzpatrick testified that they were robbed at the store on more than one occasion and appellant was 12 or 13 when someone displayed a weapon to him (R14, 910-911). Appellant had a close friend named Eddie O'Brian who has passed

away (R14, 916). Her husband's death in 1978 affected appellant very much (R14, 916).

Deborah Anne O'Neill testified telephonically. She is appellant's only sister (R14,920-921). Her children got along well with appellant; he would help them with basketball and make breakfast for them because she worked on weekends (R14, 921-922). The neighbors also loved him (R14, 923). Appellant was very good to his sick brother Michael (R14, 924-925). Appellant started using alcohol at about age twelve (R14, 925). She was not aware of his using drugs. About six months prior to being picked up and brought to Florida, he entered a detoxification center (R14, 926). Appellant has a sixteen year old son. Prior efforts with AA had been unsuccessful (R14, 928). The court permitted a letter written by appellant's niece Lani Marie O'Neill to be read into the record (R14, 931-932).

Appellant's brother John Edward Fitzpatrick ("Jackie") testified they grew up in a tough neighborhood and their father trained them in having fist fights (R14, 937). He was strict and would start swinging at them if they arrived home late (R14, 938). His uncle started appellant to drinking at age nine and appellant started using drugs at age twelve or thirteen (R14, 939-40). Appellant worked the whole day in the family store (R14, 940). Appellant dropped out of school around the seventh grade (R14, 941). He would help people in the neighborhood that

weren't able to do things themselves (R14, 942). The witness was the victim of a violent crime resulting in his being wheelchair-bound in 1982 (R14, 941-42). Before this appellant had helped a cousin, Michael Pratt, with muscular dystrophy and had learned about helping people in wheel chairs (R14, 942-943). Appellant would shop and do errands for the witness and moved him into an assisted living facility (R14, 943).

The defense introduced evidence that appellant received a GED in 1982 (R14, 946). Sheriff's office librarian Carol Lewis testified that during the time appellant has been in the Pinellas County Jail he had made requests for books and magazines but on cross-examination acknowledged that she did not know if he read the material (R14, 948-950). Defense witness Dr. Robert Berland, a psychologist administered the MMPI and WAIS tests to appellant (R15, 964). Berland opined that from his testing in 1998 appellant had a long-standing mental illness involving a variety of psychotic symptoms (R15, 979) and his brain reflected impaired functioning (R15, 983). Berland relied on police documents and medical and mental health records from Fitzpatrick's past and interviewed appellant and lay witnesses who knew him back in his pre-teen and teens (R15, 991). Appellant admitted to some psychotic thinking and hallucinations, drugs and alcohol use (R15, 991-992). Fitzpatrick admitted to depression and manic episodes (R15, 993-

994). Fitzpatrick denied command hallucinations (R15, 995). Berland talked with Lorraine O'Brian, older sister of appellant's closest and now deceased childhood friend Eddie O'Brian, with appellant's brother Jackie, with ex-girlfriend Karen Ryan, with his sister and mother, and a later girlfriend Bobbie Rogavitch (R15, 996-997). Berland read a report of an interview with Randall Trap. Appellant was described as easily and quickly agitated and angered over minor, trivial matters when not drinking and was even worse when he was drinking (R15, 998-1001). There were reports that he was less mature than his peers (R15, 1004) and that he had abused drugs and alcohol from an early age (R15, 1005). He was apparently beaten at a police station at age fifteen when he was drunk, combative and belligerent (R15, 1009-1010). Berland opined that Fitzpatrick was suffering from an extreme mental or emotional disturbance at the time (R15, 1012) and had a substantial impairment in his capacity to conform his conduct to the requirements of law (R15, 1013). He opined that appellant had the capacity to form close, loving relationships (R15, 1014) and there were indications he was sexually abused as a child (R15, 1016). Appellant had sought treatment for alcohol addiction (R15, 1017).

On cross-examination the witness stated that he was Board certified in forensic psychology (there was no licensing as a neuropsychologist) and he was not Board certified as a

neuropsychologist (R15, 1023-1024). Berland didn't ask Fitzpatrick about the homicide since there seemed little point in asking about something Fitzpatrick said he hadn't done; he didn't ask appellant about the Menard incident, by Berland's choice (R15, 1025). Berland conceded that he had not questioned appellant on what was going through his mind during the week of the Menard-Hollinger incidents (R15, 1027-28)(Berland was asked to see if there was evidence of mitigation - R15, 1026). There is no way of telling whether appellant's mumbling is only a bad habit or some sign of mental illness or psychosis (R15, 1028). The impression from lay witnesses was this was a consistent habit appellant was in (R15, 1029). Berland did not talk to appellant's brother Kevin Fitzpatrick or Paul Brown (R15, 1030-31). Berland thought Brown might be construed as having a conflicting interest; family members had an interest in being helpful (R15, 1031-32). Berland did not talk to appellant's mother about the reported incidents of the father hitting appellant. He chose not to talk to some family members because they were protective of his history and might not yield other information (R15, 1033). The overdose and coma in 1985 - five years after the Hollinger murder - could have produced further brain injury after 1980 (R15, 1034-35). All of the medical records he reviewed were for incidents after February of 1980 (R15, 1036). The knife-slashing incident in the kitchen in 1994

resulted in his arrest for threatening to kill his brother Jackie (R15, 1037-38).

State rebuttal witness psychologist Dr. Sidney Merin, an expert in clinical and neuropsychology (R15, 1049), did not have the opportunity to interview Fitzpatrick but was present during the testimony of Dr. Berland (R15, 1050). He reviewed the tests administered by Dr. Berland, the MMPI and the WAIS (R15, 1051). Dr. Berland gave the original MMPI not the revised one (R15, 1053). The newer MMPI would provide a more complete profile of an individual (R15, 1058). The risks of using an outdated MMPI form include developing an inappropriate if not false version of what's going on with the individual. He opined that the original MMPI here was not a valid profile of appellant (R15, 1059). The witness pointed out that it was different between being helpful as a caretaker to a small child or impaired individual and having strong emotional relationship with a girlfriend or spouse (R15, 1063). Merin opined that Fitzpatrick fit into the character or personality disorders (R15, 1068). Fitzpatrick's test scores suggested features associated with character disorder (R15, 1071), not an extreme mental or emotional disturbance. As to the WAIS test, there have been two subsequent revisions after this one (R15, 1071). The MMPI is not an appropriate tool to identify biological mental illness; it can give you information that schizophrenia is present but it

doesn’t tell you it’s biological. You do that only by inference (R15, 1072).

Dr. Merin was board certified in neuropsychology which deals with the specific measurement of how the brain is working (R15, 1072). The MMPI here does not show Fitzpatrick was impaired in the capacity to appreciate the criminality or conform his conduct to the requirements of law. What shows is a person who is going to act out in a bizarre sort of way but says nothing whether he is capable of understanding right from wrong so you cannot correlate clinically if he is psychotic, nothing suggests he is impaired in his goal directed thinking (R15, 1074).

As to the WAIS test, here Dr. Berland used the old 1955 form; there have been two subsequent revisions (R15, 1075-76). The test only gives hints of brain damage or impairment. Fitzpatrick’s answers were perfectly coherent, logical, relevant and clear. And more importantly, the test can be used for determining IQ (which purpose Berland didn’t use it for). Here, appellant has a verbal IQ of 109 (a college student on average has an IQ of 112-115). Fitzpatrick has a verbal IQ of 109 (R15, 1079-80). On the right side of the brain, the performance IQ ranges from 110 to 119. His thinking and behavior is reasonable, appropriate and intelligent. Fitzpatrick knows what to do and how to do it if he chooses. This is not schizophrenia (R15, 1080-81). Appellant could conform to the requirements of

law if he so chooses. Based on what he has seen there is no brain impairment or anything that would yield the suggestion that he is substantially impaired so that he could not make the voluntary choice (R15, 1081). On cross-examination he explained he would describe Fitzpatrick as having a character disorder on the basis of his review of the tests given by Berland, the information provided by the prosecutor and what he heard from Dr. Berland's testimony. He did not and would not render a diagnosis without examining the defendant (R15, 1091).

The defense then read letter from appellant's first cousin Kathy Coppola (R15, 1094-1096).

The jury recommended a sentence of death by a vote of eight to four (R6, 1027; R16, 1177). The Court subsequently imposed a sentence of death. In aggravation the Court found (1) the defendant was previously convicted of another capital felony or felony involving the use of threat or violence to the person (appellant not only stipulated to a prior conviction in Massachusetts for armed robbery, but took the stand and admitted to his participation the Menard robbery on January 30, 1980); (2) the capital felony was engaged in the commission of or attempt to commit or flight after committing a robbery of Gerald Hollinger; (3) the capital felony was especially heinous, atrocious or cruel - the medical examiner had documented forty-one knife wounds not including head wounds. In mitigation the

Court found (1) that appellant was under the influence of extreme mental or emotional disturbance and assigned it modest weight; (2) that the capacity to conform his conduct to the requirement of law was substantially impaired and assigned modest weight to it. The Court rejected the mitigator of capital felony committed by another person and appellant's participation was relatively minor, since the physical evidence did not support the presence of Paul Brown at the home of Gerald Hollinger, no fingerprints of Brown were found at the scene or on Hollinger's stolen Cadillac and the Court rejected appellant's account of the murder. The Court accepted appellant's age (and immaturity) as mitigating and afforded it little weight. The trial court explained why it rejected or accepted and gave some weight to proffered non-statutory mitigation presented (R8, 1257-73).

SUMMARY OF THE ARGUMENT

ISSUE I: The trial court did not err in submitting the case to the jury on felony-murder with alternatives of burglary or robbery, or in finding any error to be harmless. Appellant's reliance on Delgado v. State, 776 So. 2d 233 (Fla. 2000) is unavailing since the legislature has subsequently confirmed that the prior decisional law overruled by this Court's Delgado opinion was the correct interpretation of the burglary statute.

ISSUE II: The lower court did not err reversibly in limiting the cross-examination of Paul Brown. The trial court properly allowed examination of the witness as to his bias and ability to recall events and there was no abuse of discretion in the Court's concluding that inquiry into Brown's having been molested by his father was not relevant and only designed to embarrass the witness. The jury was fully apprised as to the witness's drug and alcohol abuse and any motivation for him to testify for the state.

ISSUE III The lower court did not commit reversible error by allowing the state to present collateral crime evidence, nor has appellant shown an abuse of

discretion. The evidence pertaining to the Menard robbery in Massachusetts and subsequent actions in Florida was relevant to prove the identity of the Hollinger murder, to prove his intent, his motive, to rebut the anticipated defense that someone else committed the crime, and to establish the entire context out of which the criminal conduct occurred and to make understandable why appellant would kill a man in Florida whom he scarcely knew.

ISSUE IV: The lower court did not err reversibly in failing to find and weigh certain mitigating circumstances. The trial court's sentencing order explained why certain mitigating circumstances were found and others rejected and gave the appropriate weight - within the sentencing judge's discretion to the mitigation found to exist.

ISSUE V: The lower court did not err in denying appellant's motion to declare the Florida death penalty statute to be unconstitutional because it permits a simple majority recommendation by the jury. The Court has consistently rejected appellant's argument. James v. State, 453 So. 2d 786, 792 (Fla. 1984); Brown v.

State, 565 So. 2d 304 (Fla. 1990); Whitfield v. State, 706 So. 2d 1, 6 (Fla. 1997); Cave v. State, 727 So. 2d 227, 232, n. 6 (Fla. 1998); Card v. State, _So. 2d_, 27 Fla. L. Weekly S25, 29 and n. 13 (Fla. 2001). Moreover, the instant jury recommendation was by a decisive eight to four vote.

ISSUE VI: The death sentence was not imposed in violation of the Sixth Amendment and appellant can obtain no relief under Apprendi v. New Jersey, 530 U.S. 466 (2000). The state respectfully submits that the claim is procedurally barred for the failure to present the argument below that the Sixth Amendment right to jury trial required additional facts to be found by the jury. Secondly, and alternatively, this Court has ruled the claim to be meritless Mills v. Moore, 786 So. 2d 532 (Fla. 2001); King v. State/Moore, _So. 2d_, 27 Fla. L. Weekly S65 (Fla. 2002); Bottoson v. State/Moore, _So. 2d_, 27 Fla. L. Weekly S119 (Fla. 2002). Appellant stipulated below that the prior violent felony aggravator had been established.

ARGUMENT

ISSUE I

WHETHER THE TRIAL JUDGE ERRED BY RULING THAT SUBMISSION OF THE CASE TO THE JURY ON FELONY-MURDER WITH ALTERNATIVES OF BURGLARY OR ROBBERY AS THE UNDERLYING FELONIES WAS HARMLESS ERROR.

The instant case was tried before the jury on February 14-February 18, 2000. The jury found appellant guilty of murder in the first degree (R5, 819; R13, 799-800). On February 22, 2000, the jury recommended a sentence of death by an eight to four vote (R6, 1027; R16,). On February 3, 2000, this Court issued its opinion in Delgado v. State, 25 Florida Law Weekly S79, but on August 24, 2000 the Court granted appellant's motion for rehearing, withdrew its prior opinion and issued a substituted opinion Delgado v. State, 25 Florida Law Weekly S631, and then a revised opinion at 25 Florida Law Weekly S1144 on December 14, 2000 reported at 776 So. 2d 233 (Fla. 2000). In that case, a sharply divided Court receded from Robertson v. State, 699 So. 2d 1343 (Fla. 1997), Jimenez v. State, 703 So. 2d 437 (Fla. 1997), and Raleigh v. State, 705 So. 2d 1324 (Fla. 1997). The majority interpreted the "remaining in" language of the burglary statute as applying only in situations where the remaining in was done surreptitiously and since the theory of burglary relied on by the state–that even if the initial entry was consensual

the defendant can be found guilty of burglary if the victims later withdrew their consent - was relied on by the state as the underlying felony to support the felony murder charge, a remand for a new trial was required.

The majority cited the concurring in part and dissenting in part opinion of Justice Ehrlich in Smith v. Department of Insurance, 507 So. 2d 1080, 1096 (Fla. 1987):

> "Perpetuating an error in legal thinking under the guise of stare decisis serves no one well and only undermines the integrity and credibility of the Court."

The dissent in Delgado objected that the majority " seriously errs in unsettling the law of burglary". 776 So. 2d at 242. Justice Wells explained that the "remaining in" part of the burglary statute had been settled in Florida since 1983 by the decision in Routley v. State, 440 So. 2d 1257 (Fla. 1983) and in respect to the withdrawal of the "remaining in" consent since 1988 by the decision in Ray v. State, 522 So. 2d 963, 965 (Fla. 3 DCA 1988). The dissent urged the legislature to immediately review and plainly express whether it accepted the majority's new construction of the statute, which was contrary to prior Court precedents but in favor of a precedent of a foreign jurisdiction (New York). Id. at 242.

The legislative response was swift. Chapter 2001-58, section 1, 2001 Fla. Sess. Law Serv. now reported in Florida statutes 810.015 recites:

> "(1) The Legislature finds that the case of ***Delgado v. State***, Slip Opinion No.SC88638 (Fla.2000) was decided contrary to legislative intent and the case law of this state relating to burglary prior to ***Delgado v. State***. The Legislature finds that in order for a burglary to occur, it is not necessary for the licensed or invited person to remain in the dwelling, structure, or conveyance surreptitiously. (2) It is the intent of the Legislature that the holding in ***Delgado v. State***, Opinion No. SC88638 be nullified. It is further the intent of the Legislature that s. 810.02 (1)(a) be construed in conformity with ***Raleigh v. State***, 705 So. 2d 1324 (Fla. 1997); ***Jimenez v. State***, 703 So. 2d 437 (Fla. 1997); ***Robertson v. State***, 699 So. 2d 1343 (Fla. 1997); ***Routly v. State***, 440 So. 2d 1257 (Fla. 1983); and ***Ray v. State***, 522 So. 2d 963 (Fla. 3dDCA, 1988). This subsection shall operate retroactively to February 1, 2000."
> (3) It is further the intent of the Legislature that consent remain an affirmative defense to burglary and that the lack of consent may be proven by circumstantial evidence. See also Jimenez v. State, 796 So. 2d 530 (Fla.2001) (Jimenez II).

This Court and individual Justices have previously indicated a willingness not to adhere to a ruling that has been determined to be erroneous in an effort to reach the appropriate result. See e.g., Trotter v. State, 690 So. 2d 1234, 1237 (Fla. 1996) ("In light of the specificity and promptness of the 1991 amendment to section 921.141 (5)(a), and in view of our prior case law giving retroactive application to other aggravating circumstances effecting a refinement in the law, reliance on *Trotter* would result in manifest injustice to the people of Florida by perpetuating an anomalous and incorrect application of the capital sentencing statute"); Mills v. Moore, 786 So. 2d 532, 541 (Fla. 2001) (Anstead, dissenting)("In the past this

Court has been quick to accept responsibility for its mistakes, especially if blind adherence to a flawed decision will result in a manifest injustice and the taking of a human life".); State v. Owen, 696 So. 2d 715, 720 (Fla. 1997) ("This Court has the power to reconsider and correct erroneous rulings in exceptional circumstances and where reliance on the previous decision would result in manifest injustice, notwithstanding that such rulings have become law of the case."). See also Lowry v. Parole and Probation Commission, 473 So. 2d 1248, 1250 (Fla. 1985) ("When as occurred here, an amendment to a statute is enacted soon after controversies as to the interpretation of the original act arise, a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change thereof".)

Appellant's contention that Ch. 2001-58, Laws of Florida does not apply to him because the Legislature stated that §810.015(2), Fla. Stat. (2001), is only retroactive to February 1, 2000, and he committed his crimes in 1980 is without merit. This contention completely ignores the reasons why the February 1, 2000 date was chosen.

Prior to the issuance of this Court's initial opinion in this matter on February 3, 2000, Delgado v. State, 25 Fla. L. Weekly S79 (Fla. Feb. 3, 2000), this Court and other courts of this state had interpreted the "remaining in" language of the

burglary statute such that a defendant was guilty of burglary if he remained in a dwelling, structure or conveyance after consent to remain had been withdrawn. E.g., Raleigh v. State, 705 So. 2d 1324, 1328-29 (Fla. 1997); Jimenez v. State, 703 So. 2d 437, 440-41 (Fla. 1997); Robertson v. State, 699 So. 2d 1343, 1346-47 (Fla. 1997); Routly v. State, 440 So. 2d 1257, 1262 (Fla. 1983); Thorpe v. State, 559 So. 2d 1285, 1286 (Fla. 2d DCA 1990), Ray v. State, 522 So. 2d 963 (Fla. 3d DCA 1988). This Court had also interpreted the statute so that withdrawal of consent could be shown through circumstantial evidence and that commission of a violent crime against an aware victim was sufficient circumstantial evidence that consent to remain was withdrawn. E.g., Raleigh, 705 So. 2d at 1328-29 (evidence that victim was shot several times and beaten viciously sufficient to show that consent to remain was withdrawn); Jimenez, 703 So. 2d at 440-41 (evidence that victim was beaten and repeatedly stabbed sufficient to show that consent to remain was withdrawn); Robertson, 699 So. 2d at 1346-47 (evidence that victim was bound, blindfolded, suffocated by a bra shoved down her throat and strangled sufficient to show that consent to remain was withdrawn); see also Ray, 522 So. 2d at 966-67 (evidence that victim verbally and physically resisted assault sufficient to show that consent to remain was withdrawn). This interpretation of the burglary statute only changed when this Court issued its

initial opinion in this matter on February 3, 2000. Delgado v. State, 25 Fla. L. Weekly S79 (Fla. Feb. 3, 2000).

The new section on legislative intent provides that the intent of the Legislature behind the "remaining in" language of the burglary statute was in accordance with these prior decisions. §810.015(2), Fla. Stat. (2001). As this was the state of the law before February 3, 2000, making the new section on legislative intent retroactive until two days before this Court issued the initial opinion in this matter would mean that the legislative intent for the burglary statute had never changed. In fact, the legislative history reflects that this date was, in fact, chosen because it was the Legislature's intent to restore the prior, long-standing interpretation of the burglary statute. Final Staff Analysis on HB953, Committee on Crime Prevention, Corrections & Safety, at 1, 4 (Jun. 26, 2001)("[T]he bill is a legislative restoration of the law of 'remaining in' burglaries to what it was prior to the Delgado opinion. The purpose of this provision is to 'resettle' the law with respect to pending burglaries and leave them undisturbed by the Delgado decision.") Moreover, there was no reason for the Legislature to make its statement of intent retroactive for a period greater than just before this Court changed the law as that was the law at that time and this Court has already held that this change in law does not apply retroactively. Delgado v.

State, 776 So. 2d 233, 241 & n.7 (Fla. 2000). Thus, the new section would have the affect of nullifying this Court's opinion in this matter, as the Legislature stated that its intent was. Ch. 2001-58, Laws of Florida. As such, Appellant's argument that the change does not apply to him because he committed his crime before February 1, 2000, is without merit.

Appellant next asserts that the amendment to the burglary statute should not apply to him because the Legislature also changed the language of the burglary statute prospectively. Defendant asserts that the Legislature could not have meant for its statement of intent to apply to all burglaries because in Section 2 of Chapter 2000-58, Laws of Florida, the Legislature changed the definition of burglary to provide that:

> (b) For offenses committed after July 1, 2001, "burglary" means:
> 1. Entering or remaining in a dwelling, a structure or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter; or
> 2. Notwithstanding a licensed or invited entry, remaining in a dwelling, structure or conveyance:
> a. Surreptitiously, with the intent to commit an offense therein;
> b. After permission to remain therein has been withdrawn, with the intent to commit an offense therein; or
> c. To commit or attempt to commit a forcible felony, as defined in s. 776.08.

However, Section 1 of this law plainly states that the newly created section of the Florida Statutes regarding legislative intent "shall apply retroactively to February 1, 2000."

§810.015(2), Fla. Stat. As the Legislature unambiguously stated that it intended for the statement of legislative intent in section 1 of the law to apply retroactively, this Court is not free to ignore what the legislature has said. State v. Rife, 789 So. 2d 280 (Fla. 2001).

Moreover, the legislative history of Ch. 2001-58, Laws of Florida, clearly explains why the Legislature felt the need to rewrite the burglary statute prospectively, despite the fact that the Legislature always meant for the burglary statute to be construed contrary to the construction placed upon that statute in this case. As the Legislature stated:

> Although the law of burglary, until Delgado, had been firmly established and well settled, the four members majority in the Delgado opinion found that the current "remaining in: clause of s. 810.02, F.S., is subject to different interpretations. Under s. 775.021(1), F.S., when language in a criminal statute is subject to different interpretation, the statute must be construed most favorably to the accused. In order to avoid different interpretations in the future with respect to "remaining in" burglaries, House Bill 953 creates a new section to apply to burglaries committed after July 1, 2001. The new section rewrites the definition of burglary in such a way as to specify the circumstances under which an invited entry can turn into a "remaining in" burglary.

Final Staff Analysis on HB953, Committee on Crime Prevention, Corrections & Safety, at 4 (Jun. 26, 2001). This language clearly indicates that the legislature changed the language of the burglary statute prospectively to prevent any further misinterpretation by this Court and not because it ever had a

different intent behind the burglary statute. As this Court has stated, "'When construing a statutory provision, legislative intent is the polestar that guides' the Court's inquiry." State v. Rife, supra. As both the plain language of the law and the legislative history evidence an intent that the burglary statute always criminalized "remaining in" burglaries, this Court should not ignore that intent.

Appellant suggests that the State may not prevail in its reliance on the legislative abrogation of the Delgado decision in light of Ruiz v. State, 26 Florida Law Weekly D 1532 (3 DCA, June 20, 2001). Fitzpatrick's argument as reflected in the footnote 1 observation in Ruiz that the legislative nullification limits the retroactivity to February 1, 2000 and the instant events took place prior thereto completely ignores why the February 1, 2000 date was chosen, as appellee has explained, supra.[1]

Appellee would respectfully submit that the legislature's swift and prompt response of nullification of Delgado and the reaffirmation of the law previously announced in the Raleigh, Jimenez, Robertson, Routly and Ray precedents requires the Court to acknowledge that no error occurred in the trial court's original instruction to the jury , nor was there any error in

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[1] Appellee notes that the Third District Court of Appeal has certified a question o the legislature's overruling of Delgado in Braggs v. State, 27 Fla. L. Weekly D379 (Fla. 3 DCA 2002).

the subsequent denial of the motion for new trial. (The lower court was also correct in concluding that there was a valid alternative basis to support felony-murder with robbery as the underlying felony.)

ISSUE II

WHETHER THE LOWER COURT ERRED REVERSIBLY BY IMPERMISSIBLY LIMITING THE CROSS-EXAMINATION OF PAUL BROWN.

Prior to the cross-examination of Paul Brown the trial court heard argument on the state's motion in limine (R11, 371-380). The state argued that it was merely character assassination for the defense to inquire into Brown's post-traumatic stress disorder arising from his father's having molested him (unless the defense could show PTSD affected one's memory). The prosecutor acknowledged and the Court agreed that it was fair game to inquire about the witness's sobriety or alcohol and drug use, but the fact of PTSD was not relevant (R11, 371-373). The defense indicated a desire to inquire into the sexual molestation by Brown's father (oral sex), claiming "it's relevant to the issue of homosexuality....it's one of the issues about motive, opportunity, likelihood that somebody might have committed a crime" (R, 373). The defense argued "it is more likely that he [Paul Brown] would be the type of person that would lash out given a situation involving homosexuality such as with Mr. Menard" (R, 374). The Court ruled that abuse from the father was not relevant. As to Brown being interviewed while in the VA Hospital, the Court agreed that the witness could be questioned about his drug use and alcohol problem but the fact of where he was deposed or had been hospitalized was not

relevant (R11, 376).

Florida Statute §90.612(2) provides that cross-examination of a witness is limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The Court may, in its discretion, permit inquiring into additional matters. A trial judge has broad discretion in determining limitation to be placed on cross-examination. A judge's determination to allow or disallow questioning in that regard is not subject to reversal unless the determination is clearly erroneous. However, limiting cross-examination in a manner that precludes relevant and important facts bearing on the trustworthiness of testimony constitutes error, especially when the cross-examination is directed at a witness for the prosecution. Sanders v. State, 707 So. 2d 664, 667 (Fla. 1998); Geralds v. State, 674 So. 2d 96 (Fla. 1996); See also Chandler v. State, 702 So. 2d 186 (Fla. 1997).

This Court has frequently determined that no reversible error occurs simply because the trial court exercises its discretion in limiting defense cross-examination of a witness. See Fernandez v. State, 730 So. 2d 277, 282-283 (Fla. 1999)(no abuse of discretion where court limited defense cross-examination of witnesses Prado and Hernandez by attempting to show they violated religious oaths in talking to police about appellant's statements since evidence of particular acts of

ethical misconduct cannot be introduced to impeach the credibility of a witness. The only proper inquiry into a witness's character for impeachment purposes goes to the witness's reputation for truth and veracity. The defense questioning was irrelevant); Coolen v. State, 696 So. 2d 738, 743 (Fla. 1997)(no error or abuse of discretion in limiting cross-examination to preclude asking about nature of pending criminal charges where the defense was allowed to bring out the fact of a pending felony charge and that she was on PTI. Evidence of bias is subject to a section 90.403 balancing and may be inadmissible if its unfair prejudice to a witness or party substantially outweighs its probative value. Ehrhardt, Florida Evidence §608.5. How far the inquiry can proceed into the details of the matter is within the court's discretion); Dufour v. State, 495 So. 2d 154, 159-160 (Fla. 1986); Jordan v. State, 694 So. 2d 708, 712 (Fla. 1997)(no abuse of discretion in refusing defense cross-examination on details of second conversation to explain first conversation; the disputed conversation was hearsay and the passage of time between the two statements only increased the unreliability of the hearsay); Lukehart v. State, 776 So. 2d 906, 920 (Fla. 2000)(while error to limit cross-examination of deputy on whether police had provided a lawyer after a request for counsel the error was harmless in a view of the totality of the evidence); Sanders v.

State, 707 So. 2d 664, 667 (Fla. 1998)(No abuse of discretion in disallowing defense counsel's question as to witness's drug running activities and any error would be harmless since jury was well aware of his inconsistent statements to law enforcement officers regarding this crime. The proffered testimony would have added little substance to the attempt to discredit him); Jimenez v. State, 703 So. 2d 437 (Fla. 1997); Moore v. State, 701 So. 2d 545, 459 (Fla. 1997).

The United State Supreme Court has explained after Davis v. Alaska, 415 US 308 (1974) that the confrontation clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. Delaware v. Fenstorer, 474 US 15, 20, 88 L.Ed. 2d 15, 20 (1985). Morever in Delaware v. Van Arsdall, 475 US 673, 89 L.Ed. 2d 674 (1986), the Court declared that trial judges retain wide latitude to impose reasonable limits on such cross-examination based on concerns about such things as harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant 475 US at 679.

In the instant case appellant was allowed to cross-examine Paul Brown as to his bias and credibility.

Defense counsel cross-examined witness Paul Brown at trial and elicited that when Detective Ring first spoke with him in

Massachusetts he was untruthful in telling him he had not been to Florida with Paul Fitzpatrick (R11, 385), that he wanted to lie effectively to Sergeant Ring, that he told him he hadn't been to Florida but when he found out they had his fingerprints in a hotel he tried to explain it away by stating he had been there weeks earlier with a girl (3 months before he was there with appellant)(R11, 386), a "stupid lie" since the hotel rooms were not the same (R11, 387). He went on a drinking and drug binge for months after the interview (R11, 391). After being stopped by the state trooper in December of 1995, he talked to Trooper Benoit. He had had three prior DUI's and the last incident would be a fourth and he could receive a prison sentence. Brown wanted to avoid going back to prison, and wanted to cut a deal with the Florida prosecutor. (R11, 393-395). Mr. Brown also admitted that he had had sex with Menard as a teenager (although he did not regard himself as homosexual or bisexual)(R11, 397-398). Brown testified that he contacted Menard, that if he needed help from Menard he would get it; the relationship was more friendship than sexual (R11, 399-400). It was possible he might have held the knife during the Menard incident but didn't specifically recall it (R11, 402). Brown acknowledged that was a period he was drunk, doing drugs and acting wild (R11, 402-403). Brown admitted hog-tying Mr. Menard and that Fitzpatrick cut the ropes (R11, 404). He did not hear

Fitzpatrick threaten to kill Menard or saw him hold the knife to Menard's throat (R11, 405). Brown acknowledged that he was a small guy, afraid of being in prison (R11, 407). He did not believe Fitzpatrick was homosexual (R11, 409). The first time Brown mentioned appellant's admission at Billerica Corrections that he hurt someone in Florida was to Trooper Benoit (R11, 410). Brown admitted stealing the vans in Florida (R11, 411). Brown stated that he understood the statute of limitations had run on the crime for which they could have prosecuted (R11, 422). He didn't have to receive immunity or leniency (R11, 423). He had been afraid previously of being charged with a murder (R11, 423), Trooper Benoit was the first person to whom he mentioned that Fitzpatrick threw his shoes out the window (R11, 425). Officer Ring interviewed him at the VA Hospital in Massachusetts on June 19, 1995 and re-interviewed him on June 20. Brown lied to him about things because appellant was a friend of his, he didn't know what the officer wanted, he was asking questions about Menard and didn't want to know too much other than the fact that he was in Florida (R11, 433-434). Brown admitted he refused to talk on tape when interviewed March 27, 1996 because of concern that he be deemed an accessory (R11, 442). He told Detective Ring in the March interview he had lied to Trooper Benoit (R11, 447). He told Ring he wanted to speak to a Florida prosecutor concerning possible charges that might

be placed against him (R11, 448). On redirect examination Brown admitted that for a good part of his life he has been an alcoholic and he has used drugs like marijuana (R11, 456-457). His alcohol and drug use has not affected his memory (R11, 457-458). However, over twenty years one forgets minor details (R11, 458). He had no idea what the statute of limitations might be on a federal offense of taking a stolen car across state lines (R11, 459). He seized on the opportunity to talk to Benoit - he was staying at a VA shelter - a friend told him he heard Brown and Fitzpatrick were involved in a murder and he was concerned about that (R11, 464). On recross-examination, Brown admitted that he was taking other drugs aside from alcohol and marijuana. And in Florida they had done quaaludes (R11, 472-73). These drugs didn't really affect his memory until he passed out (R11, 473).

(A) The lower court did not err in ruling that examination about Brown's suffering from post-traumatic stress disorder was irrelevant. In Edwards v. State, 548 So. 2d 656 (Fla. 1989), this Court held that evidence of witness' drug addiction or that witness had taken drugs other than at time of trial is not admissible to impeach witness absent express showing by other relevant evidence that the prior drug use affected the witness's ability to observe, remember and recount. See also Trease v. State, 768 So. 2d 1050 (Fla. 2000). The prosecutor in the

instant case argued below that the only thing that's relevant was whether or not the witness was competent to testify and "until Mr. McClure can offer some indication to this Court that PTSD affects one's memory then it's not relevant" (R11, 372). Defense counsel proffered no such evidence that PTSD adversely affected one's ability to testify. Thus, under Edwards, supra, and Trease, supra, the attempted impeachment was improper and the Court did not abuse its discretion in limiting defense counsel's effort merely to embarrass the witness.

Appellant posits three theories regarding the homicide: (1) the state's theory that Brown was not present (supported by his testimony and the fact that his fingerprints were not at the scene of the homicide). (2) Appellant's testimony that he was asleep on the sofa and awoke to find Brown fighting with and killing the victim. (3) Appellate counsel's scenario, unsupported by the testimony of anyone and refuted by both Brown and Fitzpatrick that they both robbed and killed Hollinger. Not only is this latter theory contradicted by appellant and the fact that only his fingerprints were discovered at the scene (and Fitzpatrick acknowledged the blood footprints were his) but also the physical evidence does not require acceptance of counsel's view. The victim did have defensive wounds on his left hand (R10, 198-199), all the wounds were consistent with having come from State's Exhibit 9 ($10, 215). Appellate

counsel rhetorically asks why Brown left the Floridian Motel a day before the rent expired, which is answered by Brown's testimony that he called his Aunt Kay and asked if she could put them up because they were near broke and she helped pay for bus tickets back to Boston (R10, 322, 327). And nothing in the evidence supports the view that one person could not have put the stereo system in the car. As stated, Brown denied killing Hollinger or leaving the hotel receipt there (R11, 453, 471).

(B) Appellant argued below regarding the molestation of Paul Brown by his father having oral sex with him:

> "MR. MCCLURE: And is the Court going to preclude me from inquiry regarding molestation by his father, his father having oral sex with him?
> THE COURT: And that would be relevant to what?
>
> MR. MCCLURE: I think it's relevant to the issue of homosexuality. Dr. Wood has indicated that this was obviously a homosexual type homicide, and it's one of the issues about motive, opportunity, likelihood that somebody might have committed a crime."
> (emphasis supplied)(R11, 373)

When the prosecutor suggested that it was character assassination to pursue alleged molestation by the father when the witness had already acknowledged a sexual relationship with Menard, defense counsel responded:

> "MR. MCLURE: Because it is more likely that he would be the type of person that would lash out given a situation involving homosexuality such as with Mr. Menard."

(emphasis supplied)(R11, 374)

The Court ruled it wasn't relevant here (R, 374).

On this appeal Fitzpatrick contends that he was denied the opportunity to confront Brown with evidence allegedly suggesting his anger against homosexuals. But nowhere is there any suggestion that Brown had anger towards homosexuals. He certainly did not proffer to the trial court that the witness would or could testify about such alleged anger. To have allowed such inquiry without any basis for it would have been similar to the error committed in Bowles v. State, 716 So. 2d 769 (Fla. 1998) where the state impermissibly attempted and failed to demonstrate a causal connection between the defendant's alleged hatred of homosexuals and the murder he committed. See also, Morrison v. State, _So. 2d_ (FSC 94, 666, March 21, 2002). (If the relevancy of questions going to bias is not apparent from the question itself, counsel has a duty to advise the Court of relevancy, citing Ehrhardt, Florida Evidence §608.5; Baker v. State, 517 So. 2d 753 (Fla. 2 DCA 1987); Hernandez v. State, 360 So. 2d 39 (Fla. 3 DCA 1978). Also F.S. 90.104(1)(b) provides that when a trial judge erroneously sustains an objection, in order to preserve the point for appellate review must make an offer of proof of how the witness would have responded if allowed to answer the question. Any error was harmless since defendant was given an opportunity to

expose the witness's potential bias or self-interest through another line of questioning).

Furthermore, as the colloquy below makes clear appellant sought not to show that the witness had a bias affecting his credibility before the jury, but rather that it was likely "he would be the type of person that would lash out" and kill Gerald Hollinger. As stated in Haber v. Wainwright, 756 F. 2d 1520, 1523 (11th Cir. 1985):

> "Unlike the situations in Davis [v. Alaska], supra, and Greene [v. Wainwright], supra, Haber was not attempting to inquire into Brandt's possible bias or motive for giving favorable testimony for the state in the case. Rather, at the time of trial, Haber's sole stated purpose of inquiring into Brandt's prior burglaries was to establish his motive for committing the Haber burglary and ultimately the Haber murder. As stated, this purpose was accomplished despite the trial court's restriction as the jury was aware of Brandt's prior criminal history."

In the instant case the jury was made aware of the fact that Brown had had a friendship with Menard which had included sex, that he had called Menard a fag, and that Brown and Fitzpatrick taught Menard a lesson for interfering with the party with the two girls. The Court did not abuse its discretion in disallowing questioning about sexual abuse from Brown's father. Any error in this regard is harmless. See Sanders, supra.

(C) Appellant argues that the jury was not informed that Brown was undergoing an alcohol detox program at a VA Hospital.

As indicated previously, appellee submits that the jury was adequately apprised of Brown's alcohol and drug problems both during direct and cross-examination.

(1) In 1995, he was interviewed by Sgt. Ring and Trooper Benoit, who had arrested him for DUI (R10, 294).

(2) While he and Fitzpatrick were partying every night in Florida, they "had an alcohol problem and drug problem" (R10, 311).

(3) Months after the first interview with Ring - close to Christmas, he was arrested by Trooper Benoit for DUI (R 10, 342). Until that arrest, he "stayed drunk the while time" and had previous DUIs (R10, 344).

(4) Brown was on a drinking and drug binge for months after the 1995 Ring interview (R11, 391). He was drunk when he went in and talked to Trooper Benoit, it was his fourth DUI and he potentially faced a prison sentence (R 11, 393-394).

(5) During the Menard incident, he was drunk and doing a lot of drugs (R11, 402).

(6) He and Fitzpatrick treated the Florida trip as a vacation doing drugs and drinking (R11, 411-412).

(7) Ring came to visit Brown at the VA Hospital on June 19, 1995 (R11, 433).

(8) During the time in Tampa, he was either drunk or high

or asleep (R11, 443).

(9) He has been an alcoholic for a good part of his life and has used marijuana (R11, 456-457).

(10) He seized an opportunity to discuss the matter with Officer Benoit when he was staying at the VA shelter (R 11, 464).

(11) Before going to Florida where he used quaaludes, he had gotten out of the VA Hospital for drugs and alcohol and he was clean for two years (R11, 473).

In light of the totality of the testimony, the jury was adequately apprised of Mr. Brown's drug and alcohol problems. Any further inquiry would not have been of any substantial benefit. Any error is harmless beyond a reasonable doubt.

ISSUE III

WHETHER THE LOWER COURT ERRED REVERSIBLY BY ALLOWING THE STATE TO PRESENT COLLATERAL CRIME EVIDENCE.

Prior to trial, the state filed a Notice of Intent to Use Evidence of Other Crimes, Wrongs or Acts Committed by the Defendant and Notice of Inextricably Intertwined Evidence of Other Crimes or Acts Committed by the Defendant (R3, 501-506). Thereafter, the state filed an Amended Notice on these pleadings and a Memorandum in Support of Admission of Inextricably Intertwined Evidence and State's Notice of Intent to Use Evidence of Other Crimes (R4, 643-650, 651-674). The defense submitted a Motion in Limine (See Stipulation and this Court's Order of December 10, 2001).

A pre-trial hearing was held on the Motion on December 3, 1999, and after hearing argument, the Court entered an order that the defendant's Motion in Limine was denied. (ADD I, R, 1543-1579; R4, 727-730). The Court determined that the collateral acts which occurred between January 29 and February 8, 1980[2] and included the robbery of Kenneth Menard, the theft of Menard's automobile to aid in a flight to Florida and auto thefts in the Tampa Bay area were relevant as they tended to prove the defendant's guilt of the charged offense (the murder of Gerald Hollinger), that the evidence was relevant to the

[2] The order reciting the date of February 8, 1999 (R, 728) is apparently a typographical error.

issue of identity, that the cumulative affect of the numerous similarities established a unique modus operandi, that it was relevant to prove intent, that it was relevant to prove that robbery was the motive for the murder, that the evidence was relevant to rebut anticipated defenses and to show the entire context out of which the criminal conduct arose. Additionally, the multiple thefts of tourists' vehicles by Paul Brown and Fitzgerald in the Tampa Bay area and subsequent pawning of the contents of those vehicles was evidence of the need for money and relevant to motive. Further, the use of false names and identities at a Tampa Motel was relevant to their guilty state of mind and the concealment of their true identities (R4, 727-730).

The admissibility of collateral crime evidence is subject to the abuse of discretion standard of review. Lamarca v. State, 785 So. 2d 1209, 1212 (Fla. 2001). Discretion is abused when the judicial action is arbitrary, fanciful or unreasonable which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court, Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990). Appellant has failed to establish an abuse of discretion by the lower court.

Appellant here challenges the trial court's determination that the evidence pertaining to the Menard incident - the

robbery in Massachusetts, the flight therefrom to avoid prosecution - was relevant and appropriate to the issues of identity, intent, motive, modus operandi, to establish the entire context out of which the criminal conduct arose and to rebut anticipated defenses. Below, defense counsel seemed to acknowledge that the two offenses - Menard and Hollinger - were inextricably intertwined (ADD, I, R 1546).

Not all collateral crime evidence must be similar fact evidence. See Pittman v. State, 646 So. 2d 167 (Fla. 1994)(noting that evidence of bad acts or crimes is admissible without regard to whether it is similar fact evidence if it is relevant to establish a material issue); Bryan v. State, 533 So. 2d 744 (Fla. 1988)(other crime evidence is not limited to other crimes with similar facts. Evidence of other crimes which are dissimilar to the crime charged can be admitted if the evidence of other crimes is relevant. The only limitations are that the state may not make evidence of the other crimes the feature of the trial or to introduce evidence solely for the purpose of showing bad character and it should not be admitted if its probative value is substantially outweighed by undue prejudice); Williams v. State, 621 So. 2d 413 (Fla. 1993).

A. To prove identity - The Menard and Hollinger cases shared special features:

The defendant apparently was an invited guest at the

victims' residences; both victims were homosexual; appellant used a knife to gain initial control of the victim; Fitzpatrick threatened to cut Menard's throat and Hollinger's throat was cut; appellant went through the victims' wallets and ransacked their houses and stole stereo equipment. Fitzpatrick left the crime scenes in the victims' cars and later abandoned them. The crimes occurred nine days apart and the motive for each was financial gain. See Randall v. State, 760 So. 2d 892 (Fla. 2000)(approving evidence of prior choking incidents as sufficiently similar and relevant to identification despite defense argument it showed only propensity); Schwab v. State, 636 So. 2d 3 (Fla. 1994)(approving similar fact evidence of other victims attacked as relevant to show identity, motive and opportunity and to rebut defense version and rejecting the defense contention that since the instant victim was killed but that the others were not since it is not required that the collateral crime be absolutely identical to the crime charged); Duckett v. State, 568 So. 2d 891 (Fla. 1990)(evidence in the record of defendant's tendency to pick up young, petite women and make passes at them while he was in his patrol car at night, on duty and in his uniform within six months of the victim's death relevant to establish his mode of operation, his identity and a common plan).

In Chandler v. State, 702 So. 2d 186 (Fla. 1997), this Court

repeated that it had enunciated the proper standard of relevancy for the admission of collateral crime evidence in Williams v. State, 110 So. 2d 654 (Fla. 1959). The Court explained:

> "We recognize that the crimes are not exactly the same. However, that fact alone does not preclude admission of collateral crime evidence and, indeed, would erect an almost impossible standard of admissibility... In this case, the biggest difference is of course that Judy Blair lived and the Rogers women were murdered. However, even that dissimilarity may be attributed to "differences in the opportunities with which [Chandler] was presented, rather than differences in modus operandi"" (Id at 194)

The Court found no abuse of discretion in the trial court's finding that the evidence was relevant to establish Chandler's identity as the killer, relevant to show his plan, scheme, intent and motive to lure women tourists aboard his boat to commit violence upon them and relevant to establish Chandler's opportunity to commit the murders on his boat. Similarly, here, Fitzpatrick availed himself of the opportunity as invitee to rob the owner of the premises, including taking money and stereo equipment.

B. To prove intent - The evidence of the Menard incident was relevant additionally to demonstrate intent. One of the state's theories of prosecution was that the homicide was committed in the course of a burglary and robbery. Victim Hollinger's car was taken and abandoned, stereo equipment was stolen and blood-stained wallet and dollar bill was found at the crime scene. Appellant's intent to commit such a crime for

financial reasons can be found in the circumstances that after fleeing Massachusetts and being on the lam from the Menard robbery with a minimal amount of money, Fitzpatrick needed money when the drinking and drugs "vacation" in Florida used up the proceeds and was needed for the ultimate return to Massachusetts.

C. To prove motive - Motive of course is relevant to appellant's intent. This Court has acknowledged that other crime evidence is relevant to prove there was a pecuniary motive for a murder if the evidence established that at the time of the murder the defendant needed money for some reason (and to support a pecuniary gain aggravator) and for this purpose overall similarity between the facts of the two offenses is not necessary. Finney v. State, 660 So. 2d 674, 681-682 (Fla. 1995), See also Heiney v. State, 447 So. 2d 210, 213-214 (Fla. 1984)("This evidence is relevant to show that Heiney's desire to avoid apprehension for the shooting in Texan motivated him to commit robbery and murder in Florida so that he could obtain money and a car in order to continue his flight from Texas. He had no transportation, no money, and was running from a possible murder. He was desperate"); Sexton v. State, 775 So. 2d 923 (Fla. 2000)(evidence of death of defendant's infant grandson was relevant to explain his motive for the killing of his son-in-law and demonstrating the total domination exerted over his family);

Randolph v. State, 463 So. 2d 186 (Fla. 1984).

D. To rebut anticipated defenses - In the instant case, the state anticipated that appellant would attempt to show that some third party committed the murder since he had told law enforcement he had not been in that area of Florida or that he had an innocent explanation for the presence of his fingerprints, bloody foot impressions and his paid motel receipt found at the crime scene, as well as his fingerprints found on the victim's car. This Court has held that it is a proper purpose under the Williams rule to use evidence of other crimes to rebut the defense claims. See, e.g. Wuornos v. State, 644 So. 2d 1000, 1006-07 (Fla. 1994)(to rebut defense claims on level on intent and whether defendant had acted in self defense); Pomeranz v. State, 703 So. 2d 465, 470 (Fla. 1997)(evidence of defendant's use of the same gun in another robbery corroborated the testimony of a co-defendant, was relevant to establish identity and to rebut the defense claim that the co-defendant committed the murder); Williams v. State, 621 So. 2d 413, 414-416 (Fla. 1993)(similar fact evidence of defendant's sexual assaults on women other than complainant was relevant in sexual battery prosecution to rebut defense of consensual sex where state showed a system employed by defendant in raping a victim in a manner and under circumstances which gave the appearance of consent should he meet with resistance).

Here, Fitzpatrick's pattern showed his opportunism in attacking homosexual victims to obtain needed money.

E. To establish the entire context out of which the criminal conduct occurred - As noted above, appellant below seemed to acknowledge that the two offenses were inextricably intertwined at the December 3, 1999 hearing. It is permissible to introduce collateral crime evidence to establish the entire context out of which the criminal conduct arose. See e.g. Hunter v. State, 660 So. 2d 244 (Fla. 1995); Griffin v. State, 639 So 2d 966 (Fla. 1994); Foster v. State, 679 So. 2d 747 (Fla. 1996); Zack v. State, 753 So. 2d 9, 16 (Fla. 2000)(evidence of crimes over two week period prior to murder demonstrated defendant's motive, intent, modus operandi and entire context of homicide); Hartley v. State, 686 So. 2d 1316 (Fla. 1996); Pomeranz v. State, 703 So. 2d 465 (Fla. 1997); Henry v. State, 649 So. 2d 1366 (Fla. 1994)(evidence of crimes inextricably intertwined). Here the facts and circumstances surrounding the Menard crimes occurring only days earlier were essential to understanding how and why the Hollinger murder occurred in Florida and the jury would not likely understand the crime without the background information.

Appellant argues that there is no evidence that Fitzpatrick ingratiated himself and became personally acquainted with the victims. However, Menard had testified that Paul Brown had

phoned him and asked if he could bring a friend Paul Fitzpatrick with him to see the house and Menard agreed (R10, 224). Previously Fitzpatrick had been at his house and had met him when Brown told him Fitzpatrick would bail him out of jail if Menard provided the bail money (R10, 242). He knew from Brown the house Fitzpatrick lived in (R242). Worrying that he might be killed, Menard told Brown - but loud enough and for Fitzpatrick's benefit - that the police would find the two of them through his secretary who knew Brown's background and the fact that he was staying at the house. (R10, 232). Menard insisted Fitzpatrick was the ring leader putting a knife to his throat and threatening to slit his throat, cutting the drapery cord and retying him when dissatisfied with Brown's effort and directing Brown to take stereo equipment to the car (R10, 229-234). While it is true that we do not know all the details of the initial meeting between Fitzpatrick and Hollinger, we do know that appellant deposited his fingerprints in the residence including upon glasses. Appellant testified that he and Brown were picked up by Hollinger who offered them drinks when they got to the Hollinger residence (R12, 596-97). Nor does the fact of Menard not being killed insulate appellant. Menard had mentioned to Brown and Fitzpatrick that if killed the police would discover them (which allowed Fitzpatrick the option of leaving him alive and hoping he would not report the mere

robbery). Hollinger obviously, put up greater resistance to the single knife - wielding assailant Mr. Fitzpatrick then did Menard when appellant took advantage of the opportunity for another robbery with the "vacation" funds ebbing.

As to appellant's assertion that the similarities of the two offenses were not so compelling, appellee has previously noted that the similarity requirement relates only to when identity is the purpose for introduction of the collateral crime evidence, not for other legitimate purposes such as intent, motive, modus operandi rebuttal of anticipated defenses, and context of the entire episode. There were sufficient similarities here.[3]

ISSUE IV

WHETHER THE SENTENCING JUDGE ERRED REVERSIBLY BY ALLEGEDLY FAILING TO FIND AND WEIGH CERTAIN MITIGATING CIRCUMSTANCES.

Appellant next contends that the lower court erred in failing to find as mitigation appellant's (a) Rough Environment (Brief, P. 61-62), (b) Recognition of Addiction and Seeking Treatment (Brief, P. 63), (c) Being a Parent of one Child (Brief, P. 63-64), (d) Prejudice to Him Resulting From the passage of Time (Brief, P. 64-66).

The determination of whether mitigation has been established

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[3] Appellant argues at Brief, P.56 that intent and motive were not material facts in issue. The state disagrees. Intent is an element of premeditation in first degree murder and motive is evidence of intent, for both the premeditation and felony-murder theories of the prosecution. Appellant certainly did not stipulate that he had the requisite intent.

and the weight given to each mitigating factor rests within the discretion of the trial court. See Robinson v. State, 761 So. 2d 269, 276 (Fla. 1999); San Martin v. State, 705 So. 2d 1337, 1348 (Fla. 1997); Chandler v. State, 702 So. 2d 186, 201 (Fla. 1997); Blackwood v. State, 777 So. 2d 399, 409 (Fla. 2000); Bowles v. State, _ So. 2d _, 26 Fla. L. Weekly S659, 662 (Fla. 2001).

A trial court may reject a claim that a mitigating circumstance has been proven, provided the record contains competent substantial evidence to support the rejection. Franqui v. State, _ So. 2d _, 26 Fla. L. Weekly S695 (Fla. 2001); Mansfield v. State, 758 So. 2d 636, 646 (Fla. 2000); Ferrell v. State, 653 So. 2d 367, 371 (Fla. 1995).

(A) Rough Environment - The lower court determined that appellant did not reasonably establish this mitigating circumstance. While it was alleged that Fitzpatrick was raised in a “rough” neighborhood in South Boston and that most of his peers were either in jail or dead, the lower court noted that appellant’s siblings Deborah, Kevin and Jackie grew up in the same neighborhood and managed to live crime-free lives (R. 8, 1267). Appellee notes that the Court found and gave some weight to related factors in the defendant’s background including alcohol abuse, drug use at an early age, abusive home life and brain injury (R. 8, 1266-1268).

As to abusive home life, the Court noted:

> "The Defendant's father was physically abusive to the Defendant and his mother became an alcoholic. The Defendant was responsible at a young age for caring for the store and his brother with down syndrome. The Defendant was forced to drop out of school because he missed school time caring for his brother and working in the family store. The Court is reasonably convinced that the Defendant did suffer hardships during his youth and the Court finds the Defendant has reasonably established this mitigating circumstance and gives it some weight." (R. 8, 1267-68)

The trial court in effect found what was mitigating in appellant's background. That the court may have rejected the label of "rough environment" as mitigating in this case does not constitute error much less reversible error. Moreover, if appellant adopted an ethos of committing crimes and maintaining silence, that is not mitigating. See Ford v. State, _ So. 2d _, 26 Fla. L. Weekly S602, 605 (Fla. 2001)(if a factor does not fall within a statutory category, but nevertheless meets the definition of mitigating circumstance, it must be shown to be mitigating in each case, not merely present... while non-statutory factors may be mitigating in nature they may or may not be mitigating under the facts in the case at hand. Any error is harmless since the factors occupied a tangential position in the record, there was vast aggravation and the trial court found and gave weight to numerous other mitigators); Trease v. State, 768 So. 2d 1050, 1055 (Fla. 2000).

(B) Recognized Addiction and Sought Treatment - The lower court noted that a few months before his arrest appellant had checked himself into a detox center but that recognition of a drinking and substance abuse problem "sixteen, years after the murder is not logically connected to any capacity for rehabilitation" and in fact "the evidence establishes that over the years, the Defendant attempted rehabilitation and failed on many occasions" (R. 8, 1268). See Rogers v. State, 511 So. 2d 526, 535 (Fla. 1987)("We thus find that the record factually does not support a conclusion that Rogers' childhood traumas produced any effect upon him relevant to his character, record or the circumstances of the offense...").

Appellee notes that the lower court had earlier given modest weight to appellant's alcohol abuse, and drug abuse at an early age (R. 8, 1266-1267) and appellant's alcohol abuse and testimony of his entering a detox center in 1996 formed part of the lower court's analysis in the finding of the statutory mental mitigator of under the influence of extreme mental or emotional disturbance, to which the court assigned modest weight (R. 8, 1262-1263). Thus, the fact of addiction was considered. Deborah O'Neill, appellant's sister, testified that appellant entered in detoxification center about six months before Florida picked him up in early 1996; he had tried AA before and it just didn't work (R. 14, 926, 928-29). The lower court was correct

in noting that his seeking treatment sixteen years after the homicide would be unrelated to the circumstances of the offense.

Appellant can receive no sustenance from the cases relied on. Caruso v. State, 645 So. 2d 389 (Fla. 1994) involved 11 - 1 jury life sentence recommendations and is inapposite here as the protections of Tedder v. State, 322 So. 2d 908 (Fla. 1975) were implicated. This Court has acknowledged that jury override cases involve a wholly different legal principle. Burns v. State, 699 So. 2d 646, 649 n 5 (Fla. 1997). Snipes v. State, 733 So. 2d 1000 (Fla. 1999) is also distinguishable. The mitigation there included a seventeen year old defendant, sexually abused for a number of years as a child, he had abused drugs and alcohol and had no prior violent history. Additionally, he expressed remorse and voluntarily confessed to the crime, the crime was arranged by older individuals and Snipes was easily led by older persons. In contrast, appellant acted alone in this robbery-killing, had a prior violent felony conviction for a similar robbery committed only days earlier and denied culpability by testifying he was asleep on a couch when a companion assaulted the victim. Appellant is not now a mere teenager.

(C) Parent of One Child - The lower court explained:

> "While Deborah, the Defendant's sister, related that the Defendant has a sixteen year old son, there was no evidence presented from which the Court could deduce

> to what extent the Defendant participated in this child's life.
> The Court does not find that this mitigating circumstance has been established." (R. 8, 1271)

Appellee notes that the lower court found and gave appropriate weight to the related non-statutory mitigating factors of a personal nature that he cared for his brothers Michael and Jackie, that he had the capacity to maintain close ties with his immediate family and had the capacity to form close loving relationships (R. 8, 1269-70).

Appellant speculates that the fact of parenthood is mitigating because of the "potentially devastating effect on the child that execution of his or her parent might cause". That may be true or it may be true that it has little or no effect on a child who had little or no relationship to the parent. In any event, the effect on the child does not shed light on the defendant's character or the circumstances of the offense and thus is not really relevant to mitigation.

(D) Prejudice Due to Passage of Time - In a section labeled Other Circumstances the lower court's findings recite:

> "The Defendant has requested that the Court consider other circumstances surrounding the Defendant's behavior after the murder. If the Defendant did not commit the murder and Paul Brown did, why didn't the Defendant report what he had witnessed? The neighborhood "code of silence" was offered as an explanation for the Defendant's sixteen year silence about the murder. The Court finds this argument unpersuasive and

> rejects this as a mitigating circumstance. The Defendant suggests that the Court should consider that the Defendant was not arrested until 16 years after the murder of Gerald Hollinger. For this reason, many records and witnesses were no longer available or located. The reasons for the delay in the prosecution were not offered at trial and are not in evidence. The Court rejects this as a mitigating circumstance" (R. 8, 1271-1272).

Additionally, appellee would submit that it would be grossly unfair to presume that the absence of evidence qualifies as mitigation, especially since the defendant waived the no significant history of criminal activity mitigator, thereby precluding the state from offering evidence to refute it (R. 8, 1272).

Appellee initially points out that appellant waived consideration of the statutory mitigating factor of no significant history of prior criminal activity, F.S. 921.141(6)(a) (R. 14, 836-837); R. 5, 869-70). The effect of such a waiver precluded the state from showing a significant history of prior criminal activity. See Maggard v. State, 399 So. 2d 973 (Fla. 1981); Pangburn v. State, 661 So. 2d 1182 (Fla. 1995). If appellant had chosen to assert the no significant history mitigator, the state could have rebutted it by showing, for example, drug activity, Slawson v. State, 619 So. 2d 255, 260 (Fla. 1993).

Secondly, the delay of sixteen years between commission of

the murder and indictment must be attributed to the appellant who fled the state of Florida after the crime and attempted to remain at large in Massachusetts but for a brief stay in prison for the Menard crime. Furthermore, the alleged unsuccessful efforts to locate potential witnesses George Flint and Reggie Reagan who might have information about statements Fitzpatrick made in prison (apparently to impeach Paul Brown) as explained at the Spencer hearing do not relate to penalty phase mitigation (R. 8, 1336-37).

Appellant also speculated that Bobby Langlois, a neighbor of Fitzpatrick - about whom there were Massachusetts records he was deceased - might have sexually abused appellant as a child and further speculated apparently that if not deceased the witness might admit it. There was no documentation, no court hearings or civil commitments or anything related to alleged sexual abuse by Langlois towards Fitzpatrick (R. 8, 1338-39). That defense counsel could not locate “friends and associates” of appellant prior to the 1980 homicide for information about his drug use (which the state could have used under Slawson, supra) or his “general state of mind” prior to the offense does not mean the state has failed to afford due process, but rather such speculative ventures are a consequence of appellant’s choosing to remain at large while the crime remained unsolved.

Appellant acknowledges that he had been unable to find case

law supporting the view that the delay in prosecution is unduly prejudicial in the penalty phase but cites Scott v. State, 581 So. 2d 887 (Fla. 1991). In that case, this Court found, relying on United States v. Townley, 665 F.2d 579 (5th Cir. 1982),[4] that Scott had shown actual prejudice resulted from a seven year, seven month delay in a circumstantial evidence case where the passage of time had damaged his alibi defense and his alibi defense originally had checked out and the prosecutor declined to prosecute because of the alibi. This Court subsequently distinguished Scott in Rivera v. State, 717 So. 2d 477, 483-484 (Fla. 1991), a case where the defendant could not show actual prejudice (the defendant never had an alibi for the critical thirty minutes in question). Here, appellant only suggests possible or speculative prejudice. The record reflects that the defense was able to offer evidence and argument pertaining to Fitzpatrick's background both through lay and expert testimony. Appellant's claim is meritless and must be rejected.

(E) Harmless Error - Finally, even if this Court were to

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[4] Subsequently, the Fifth Circuit Court of Appeals overturned Townley in United States v. Crouch, 84 F.3d 1497,1514 (5th Cir. 1996)(en banc) and held that for pre-indictment delay to violate the due process clause it must not only cause the accused substantial, actual prejudice, but the delay must also have been intentionally undertaken by the government for the purpose of gaining some technical advantage over the accused in the contemplated prosecution or for some other impermissible, bad faith purpose. Obviously, appellant cannot satisfy this standard as Detective Ring explained how he was able to discover and locate Mr. Fitzpatrick years after the homicide.

conclude that any or all of these non-statutory mitigating factors should have been found, any such error would be harmless error. Thomas v. State, 693 So. 2d 951 (Fla. 1997)(evidence that defendant was a good worker who did not cause trouble, a delightful young man who is very loving and that a witness "had seen a lot of good in him" constituted harmless error because relatively minor in comparison to the aggravation) Wickham v. State, 593 So. 2d 191, 194 (1991)(finding harmless the trial court's failure to find as mitigating abusive childhood, alcoholism, extensive history of hospitalization for mental disorders including schizophrenia); Lawrence v. State, 691 So. 2d 1068, 1076 (Fla. 1997)(if trial court failed to consider history of substance abuse mitigator, the error would be harmless since it would not offset the three aggravators properly found); Morton v. State, 789 So. 2d 324 (Fla. 2001)(failure to find or mention anti-social personality was harmless in light of the substantial aggravation presented in the case); Wuornos v. State, 644 So. 2d 1000, 1011 (Fla. 1994)(holding trial court's failure to find and weigh defendant's alcoholism, difficult childhood and some degree of non-statutory impaired capacity and mental disturbance to be harmless error given the aggravating circumstances in the record); Singleton v. State, 783 So. 2d 970, 977 (Fla. 1002)(holding trial court's error in failing to address non-

statutory mitigation was harmless because the mitigators would not outweigh the aggravators in the case).

In the instant case, the trial court found and considered other appropriate mitigating factors; the three aggravators were substantial including the very serious HAC factor and appellant's prior conviction of a violent felony offense. The instant homicide was committed in an effort to deprive the victim of his property. Any error subjudice was harmless beyond a reasonable doubt.

Proportionality - Finally, the sentence of death is proportionate here where the lower court properly found three valid, strong, unchallenged aggravators: (1) prior violent felony conviction (appellant stipulated to the Massachusetts armed robbery conviction); (2) capital felony was committed during the commission of a robbery; (3) capital felony was especially heinous, atrocious or cruel (documented forty-one knife wounds not including the head wounds)(R. 8, 1258-60).[5]

This Court recently stated in Robinson v. State, 761 So. 2d 269, 277-278 (Fla. 1999):

> Upon review, we find that death is the appropriate penalty in this case. In reaching this conclusion, we are mindful that this Court must consider the particular circumstances of the instant case in

[5] The Court also found the two statutory mental mitigators, although there was conflicting expert testimony thereon (R. 8, 1261-64), age of twenty-two (R. 1265-66), and some minor non-statutory mitigation (R. 1266-71).

> comparison with other capital cases and then decide if death is the appropriate penalty. *See Sliney v. State*, 699 So. 2d 662, 672 (Fla. 1997(citing *Terry v. State*, 688 So. 2d 954, 965 (Fla. 1996), *cert. denied*, 118 S.Ct. 1079 (1998)); *Livingston v. State*, 565 So. 2d 1288, 1292 (Fla. 1988). Proportionality review is not simply a comparison between the number of aggravating and mitigating circumstances. *Terry*, 668 So. 2d at 965. Following these established principles, it appears the death sentence imposed here is not a disproportionate penalty compared to other cases.9 (footnote omitted) *See Foster v. State*, 691 So. 2d 1062 (Fla. 1996); *Foster v. State*, 654 So. 2d 112 (Fla. 1995).
>
> (Id. at 277-278)

Moreover, proportionality review function is "not to reweigh the mitigating factors against the aggravating factors; that is the function of the trial judge." Holland v. State, 773 So. 2d 1065, 1078 (Fla. 2000); Bates v. State, 750 So. 2d 6 (Fla. 1999); Kearse v. State, 770 So. 2d 1119, 1134 (Fla. 2000).

This Court has acknowledged the very weighty position the HAC aggravator occupies in the capital sentencing jurisprudence. See Maxwell v. State, 603 So. 2d 470, 493 (Fla. 1992); Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999); Card v. State, _ So. 2d _, 26 Fla. L. Weekly S670, 672 (Fla. 2001).

The instant case is proportional in comparison to similar cases. See, e.g. Singleton v. State, 783 So. 2d 970 (Fla. 2001)(victim stabbed seven times and two aggravators including prior violent felony conviction and HAC); Rogers v. State, 783 So. 2d 980 (Fla. 2001)(stabbing death, two aggravating

circumstances of pecuniary gain and HAC outweighed impaired capacity to appreciate criminality of his conduct or to conform to the requirements of law and non-statutory mitigation); Spencer v. State, 691 So. 2d 1062 (Fla. 1996)(two aggravators of HAC and prior violent felony aggravator outweighed two statutory mental mitigators); Robinson v. State, 761 So. 2d 269 (Fla. 1999)(death proportionate where three aggravating factors of avoid arrest, pecuniary gain and CCP present despite the presence of the two statutory mental health mitigators).

ISSUE V

WHETHER THE LOWER COURT ERRED BY DENYING APPELLANT'S MOTION TO DECLARE THE FLORIDA DEATH PENALTY STATUTE UNCONSTITUTIONAL BECAUSE IT PERMITS A SIMPLE MAJORITY RECOMMENDATION BY THE JURY.

Appellant filed a motion to declare the death penalty statute unconstitutional because only a bare majority of jurors is sufficient to recommend a death sentence (R5, 870-71). The lower court denied the motion (R8, 1283). This Court has consistently and with regularity rejected this argument. See, e.g. James v. State, 453 So. 2d 786, 792 (Fla. 1984), Brown v.State, 565 So. 2d 304 (Fla. 1990), P. Taylor v. State, 638 So. 2d 30, 33, n.4 (Fla. 1994), Thompson v. State, 648 So. 2d 692, 698 (Fla. 1994), Whitfield v. State, 706 So. 2d 1, 6 (Fla. 1997), Cave v. State, 727 So. 2d 227, 232 n.6 (Fla. 1998), Card v. State, _So. 2d_, 27 Fla. Law Weekly S25, 29 and n.13 (Fla. 2001).

Appellant provides no compelling, persuasive reason for this Court to abandon its well-established jurisprudence and destroy the principle of stare decisis in order to revisit this properly-rejected argument. Accordingly, the Court should decline to do so and reaffirm that a simple majority vote is sufficient for a jury's recommendation of death. Even if this Court were now to accept such a contention and condemn a bare majority recommendation, it would avail appellant naught as the

instant jury recommendation was by a decisive eight to four vote. This claim is meritless.

ISSUE VI

WHETHER THE DEATH SENTENCE WAS IMPOSED IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE AGGRAVATING CIRCUMSTANCES WERE NOT CHARGED BY INDICTMENT AND ALLEGEDLY NOT DETERMINED BY HIS JURY.

Appellant acknowledges that he did not rely on Apprendi v. New Jersey, 530 US 466 (2000) in the lower court and explains that Apprendi was not decided until June 26, 2000, while his trial took place February 14-22, 2000. This chronology, however, does not excuse his procedural default in failing to properly raise the claim below. Even prior to his trial, appellant could have urged reliance on the earlier case of Jones v. State, 526 US 227 (1999). The Apprendi Court noted that its decision "was foreshadowed by our opinion in Jones v. United States, 530 US at 476. The Court added:

> We there noted that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment submitted to a jury, and proven beyond a reasonable doubt." Id at 243, n. 6, 119 S.Ct. 1215.
>
> (530 US at 476)

Since the tools were available to construct the argument and appellant failed to do so, he is procedurally barred from

raising this claim initially on appeal. See Engle v. Isaac, 456 US 107, 134 (1982)("where the basis of a constitutional claim is available and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default").

Appellant contends that he presented his "Apprendi" claim adequately below by his Motion to Declare Section 921.141, Florida Statutes Unconstitutional (R4, 625-626) and his Motion for Statement of Aggravating Circumstances (R4, 627-30). The latter motion was denied (R8, 1282), as was the former motion (R8, 1294, 1296).

Appellee disagrees. In the first motion urging the statute, or at least 921.41(5)(d), unconstitutional Fitzpatrick argued that the failure to apprise him of whether the state was proceeding on a theory of premeditated design or felony murder constituted a denial of equal protection of laws and did not narrow the class of death-eligible murderers under the Eighth Amendment (R4, 625-626).

In the latter Motion for Statement of Aggravating Circumstances, appellant complained that he was not given notice of what aggravators the state intended to use, that such lack of notice undermined his right to effective assistance of counsel and due process of law (R4, 627-630). The defense also orally

declared:

> "...we are asking for a special jury verdict form that allows the jury to set forth what factors they are considering in recommendation of life as opposed to death" (emphasis supplied) (R8, 1320)

Appellant did not present below his current contention that the Sixth Amendment right to a jury trial required that aggravators be charged in the indictment and found by the jury. Since this claim was not presented below, appellant may not initiate the claim for review here. See generally Steinhorst v. State, 412 So. 2d 332 (Fla. 1982); Occhicone v. State, 570 So. 2d 902 (Fla. 1990); Woods v. State, 733 So. 2d 980, 984 (Fla. 1999); Archer v. State, 613 So. 2d 446, 448 (Fla. 1993); Bradley v. State, 787 So. 2d 732 (Fla. 2001) (defendant barred from challenging burglary conviction on direct appeal for failure to preserve in the lower court.)

This Court has consistently and regularly ruled - in a similar context - that a defendant has not adequately preserved for appellate review a claim that a jury instruction is constitutionally inadequate simply by objecting to the lack of evidentiary support for an aggravator. See Occhicone v. State, 618 So. 2d 730 (Fla. 1993); Lightbourne v. State, 644 So. 2d 54 (Fla. 1994); Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993); Pope v. State, 702 So. 2d 221 (Fla. 1997).

Appellee respectfully requests this Court to continue to

enforce its procedural default policy to preclude consideration on appeal of claims that were not adequately preserved by appropriate and timely objection in the trial court. Failure to include a plain statement that the Court's decision rests on a procedural bar (which constitutes an adequate and independent state ground for denial of relief) can result in the federal courts addressing the merits of the claim and disagreeing with this Court's conclusion as to the merits of the claim. See Harris v. Reed, 489 US 255 (1989); Coleman v. Thompson, 501 US 722 (1991); See also Ylst v. Nunnamaker, 501 US 797 (1991)(where the last explained state court judgment unequivocally rested on a state procedural default, that default will be handled despite subsequent unexplained rulings).

Appellee, secondarily and in the alternative, also argues that apart from the procedural default precluding review the instant claim is meritless. Mills v. Moore, 786 So. 2d 532 (Fla. 2001), cert. denied. _US_, 149 L.Ed 2d 673 (2001); King v. State/Moore, _So. 2d_, 27 Fla. L. Weekly S65 (Fla. 2002); Bottoson v. State/Moore, _So. 2d_, 27 Fla. L. Weekly S119 (Fla. 2002).[6]

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[6] Appellee has no objection to this Court also deciding as an alternative basis for its decision that the Apprendi claim is meritless pursuant to these recent precedents; but nevertheless would still urge the Court to announce its reliance on, and enforcement of its procedural default jurisprudence and a clear statement that relief must be denied for appellant's failure to preserve the claim by timely and appropriate objection in the

Finally, appellant cannot obtain any relief under Apprendi, supra, because the Fitzpatrick jury in the penalty phase was instructed on the necessity of finding an aggravating circumstance beyond a reasonable doubt (R16, 1173) and appellant stipulated both below to the trial court and to the jury (R14, 859-60, 881-882; R15, 1146) and in this Court (Amended Brief, P. 78) that he had a prior violent felony conviction for the robbery of Menard.

The jury's participation in the sentencing was constitutionally adequate. Hildwin v. Florida, 490 US 630 (1989); Spaziano v. Florida, 468 US 447 (1984).

CONCLUSION

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

Respectfully submitted,

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trial court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to James Marion Moorman, Public Defender, Tenth Judicial Circuit and Douglas S. Connor, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000-Drawer PD, Bartow, Florida 33831, this _____ day of March, 2002.

CERTIFICATE OF TYPE SIZE AND STYLE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

_____

COUNSEL FOR APPELLEE