IN THE SUPREME COURT OF FLORIDA

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| WILLIAM DEPARVINE, | : | |
| Appellant/Cross-Appellee, | : | |
| vs. | : | Case No. SC06-0155 |
| STATE OF FLORIDA, | : | |
| Appellee/Cross-Appellant. | : | |
| | : | |

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

# REPLY BRIEF OF APPELLANT
# ANSWER BRIEF OF CROSS-APPELLEE

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TENTH JUDICIAL CIRCUIT

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ISSUE I (Karla Van Dusen's Statements)

Hutchinson

The state on appeal, as it did in the trial court, continues to insist that this Court's clear statement in Hutchinson v. State, 882 So.2d 943,951 (Fla. 2004) is an aberration (see 1/157-63;2/227;state's brief, hereinafter referred to as SB,p.24-27). The state is wrong. In Hutchinson, the Court recognized that the spontaneous statement and excited utterance hearsay exceptions, while they differ primarily in the allowable time lapse between the event and the statement, both require that the declarant be laboring under the influence of a startling event at the time the statement is made. This statement in Hutchinson accurately summarizes Florida law under both the old res gestae exception (which has been broken down into its component parts and carried over into the present Evidence Code) [see Carver v. State, 344 So.2d 1328, 1331 (Fla. 1st DCA 1977), quoted in Jano v. State, 510 So.2d 615,617 (Fla. 4th DCA 1987); State v. Snowden, 345 So.2d 856,860 (Fla. 1st DCA 1977), which retains its vitality under the Evidence Code, see the thorough discussion in State v. Adams, 683 So.2d 517,520-21 (Fla. 2d DCA 1996)], and under the Evidence Code itself. See Lyles v. State, 412 So.2d 458,460 (Fla. 2d DCA 1982)("In order for the

spontaneous statement exception to the hearsay rule to be applicable, there must be some occurrence startling enough to produce nervous excitement and render the utterance spontaneous and unreflecting"); Quiles v. State, 523 So.2d 1261,1263 (Fla. 2d DCA 1988)("nervous excitement" is a required predicate for both spontaneous statement and excited utterance exceptions); Blue v. State, 513 So.2d 754,755-56 (Fla. 4th DCA 1987)(quoting Lyles for the proposition that a startling occurrence is necessary for statement to be admissible under the spontaneous statement exception, and then going on to find that the reasoning of Lyles "applies equally to the excited utterance exception"); Jano v. State, 510 So.2d 615,617-18 (Fla. 4th DCA 1987)(quoting Carver and Lyles), decision approved in State v. Jano, 524 So.2d 660 (Fla. 1988); Hargrove v. State, 530 So.2d 441,442 (Fla. 4th DCA 1988)(a showing that declarant was in a state of stress or excitement is necessary for admission of hearsay statement as a spontaneous statement or an excited utterance).

In the instant case, the circumstances surrounding Karla VanDusen's long telephone conversation with her mother Billie Ferris did not show that she was under the influence of a startling or exciting event; in fact, the circumstances show just the opposite. The trial judge did not accept the prosecutor's invitation to disregard Hutchinson on the theory that it was wrong or dicta. Instead, the judge distinguished Hutchinson based on his finding of "the requisite indicia of

reliability" (R2/256). This was error. Florida has no "residual" or "catch-all" exception which would allow introduction of otherwise inadmissible hearsay statements based on a trial court's finding of reliability. As was explained in Jano v. State, supra, 510 So.2d at 619, decision approved in State v. Jano, supra:

> ...[R]eliability is not the issue of law before this court. The Florida legislature had the opportunity to include a general safety valve exception to the hearsay rule, one where evidence is deemed reliable but is not otherwise admissible – see rule 803(24), Federal Rules of Evidence – but chose not the include such a provision in the Florida Code [footnote omitted].

See also Blandenburg v. State, 890 So.2d 267,271 (Fla. 1st DCA 2004).

A trial judge's discretion in ruling on the admissibility of evidence "is limited by the rules of evidence...and by the principles of stare decisis", and the judge's ruling constitutes an abuse of discretion if it is based "on an erroneous view of the law or on a clearly erroneous assessment of the evidence". Johnson v. State, ____ So.2d ____ (Fla. 2007)[2007 WL 1933048]. Under the applicable standard of review, Judge Ficarrotta's pretrial ruling (adhered to at trial, over renewed defense objection, by Judge Padgett) allowing the state to introduce Billie Ferris' hearsay testimony was error.

Present Sense Impression

Even if Hutchinson (and Jano, Lyles, Quiles, Blue, and Hargrove) didn't exist, the state would still be wrong in claiming admissibility of Karla's out-of-court statements to her mother under the "spontaneous statement" hearsay exception. The state's argument against Hutchinson is largely based on the opinion of Professor Ehrhardt (SB24-25). However, the state completely ignores on appeal the other part of Professor Ehrhardt's opinion, which is that the admissibility requirements under Florida's "spontaneous statement" exception are the same as those for the federal "present sense impression" hearsay exception. Ehrhardt, Florida Evidence, §803.1, p.844-45 (2007 Ed.). [In the trial court, the prosecution affirmatively argued that Florida's spontaneous statement provision "was modeled after, and is nearly identical to" Federal Rule of Evidence 803(1), which sets forth the present sense impression exception (1/161)]. The hallmarks of a statement admissible as a present sense impression are that it must be descriptive and/or sensory (rather than narrative); it must not refer to past occurrences or anticipated future events; and there must be no opportunity for the speaker to have engaged in reflective thought or retrospective mental processing of information. [See appellant's initial brief, p. 23-27]. Karla's statements to her mother during their phone conversation fail to meet any of the criteria for admissibility as "present sense impressions".

It cannot necessarily be assumed from her use of the word "following" that she was even in visual contact with the back of the truck at the moment she made the statement to her mother that she was "following Rick and the guy that bought the truck"; the two vehicles could easily have been separated by other traffic. Even if she was able to see the back of Rick's truck, however, she was not seeing a person who was facing forward in the front passenger seat. Karla was not describing what she was then perceiving with her senses when she told her mother she was following Rick and the guy that bought the truck; that necessarily had to have been based on reflective thought concerning the earlier transaction. At best, she was telling her mother who she'd seen getting into the truck with Rick when they began driving. Similarly, her statements that the buyer had cash to pay for the truck, and he knew where to get the paperwork done that night, were not observations made contemporaneously as Karla was driving (alone) in the Jeep talking to her mother on the phone. These statements, as well, required reflective thought concerning the past transaction and anticipated future events, and thus were not admissible as "spontaneous statements" [see Strong v. State, 947 So.2d 552 (Fla. 3d DCA 2006); Fratcher v. State, 621 So.2d 525 (Fla. 4th DCA 1993)], nor as "present sense impressions" [see, e.g. Brown v. Keane, 355 F.3d 82,89 (2d Cir. 2004); United States v. Guevara, 277 F.3d 111,127 (2d Cir. 2001); State v. Phillips, 461 S.E.2d 75,89 (W.Va.1995);

Commonwealth v. Farquharson, 354 A.2d 545,554 (Pa. 1976).[1]

Acts of Subsequent Conduct

The state, relying on Huggins v. State, 889 So.2d 743,757

[1] Undersigned counsel mis-cited the Farquharson case in his initial brief, p.25,27; the correct cite is above.

(Fla. 2004), suggests as a "tipsy coachman" argument that Karla's statements were admissible under Fla. Stat. §90.803(3), as statements of her then-existing state of mind, to prove or explain her acts of subsequent conduct (SB29-31). The state also offers the even more exotic theory that her statements were admissible to show that (even though she referred to "the guy that bought the truck" using the past tense) paperwork still needed to be done to complete the transaction; hence a legal transfer of ownership had not yet been finalized. [See appellant's initial brief, p.28-31]. Neither of these rationalizations had anything to do with the purpose for which the prosecutor introduced Karla's statements, as evidenced by his opening statement, his cross-examination of appellant, and his closing argument to the jury.

Karla told her mother that she was following Rick and the guy that bought the truck; the buyer had cash and knew where to get the paperwork done that night. Karla did not say where she was going, and it appears that she did not even know where she was going. Contrast Huggins, in which the murder victim Larson's statement that she was going to Publix and would return shortly was admissible to prove that she went to Publix, and "to inferentially rebut the defense argument that [she] may have voluntarily accompanied her killer from Publix to another location". 889 So.2d at 757. It is important to emphasize that at the time she made the statement, Larson had

yet to encounter her killer; her statement was not introduced to identify the perpetrator of the crime, nor was it introduced to prove the defendant's acts of subsequent conduct.

Karla VanDusen's hearsay statements in the instant case are nothing like those held admissible in Huggins; instead they are conceptually similar (although much more extreme, and used more directly to prove identity) to the statements which this Court held inadmissible in Taylor v. State, 855 So.2d 1,18-21 (Fla. 2003). As in Taylor, it is abundantly clear "that the state's interest in admitting the [victim's] statements was not to prove her subsequent acts", but rather to prove the defendant's acts and to identify him as the killer. 855 So.2d at 20 (emphasis supplied). In Taylor, the prosecution's real "purpose in introducing the statements was to prove that Taylor had requested a ride all the way to Green Cove Springs, providing support for the State's theory that Taylor was the one who was in the car when she was murdered." 855 So.2d at 20. This was error, since a murder victim's out-of-court statements evincing his or her state of mind cannot be used to prove the identity of the killer, or to impeach the defendant's contention that someone else committed the murder. Taylor; Stoll v. State, 762 So.2d 870,875 (Fla. 2000); see, e.g., State v. Fulminante, 975 P.2d 75,90 (Ariz. 1999)(following "the great weight of authority" and holding that "[e]vidence of a victim's state of mind is not admissible

to establish the conduct of another and thus the identity of the perpetrator of the crime").

This Court can examine the prosecutor's words to the jury (and his words to appellant before the jury) to determine whether he introduced the statements to prove Karla's state of mind or Karla's subsequent conduct (or that the transfer of legal ownership of the truck had not yet been finalized), or whether he used it as evidence of identity. Near the end of his opening statement he said:

> The evidence will show you that William Deparvine was the only person who had motive, who had opportunity, who had familiarity with Oldsmar, who left physical evidence at the murder scene within the jeep and who was the purchaser of the truck that Karla Van Dusen was describing when she told her mother she was following Rick and the man who bought the truck because he was going to do - - he knew where to do the paperwork that night.

(28/1822)

When appellant testified in his own behalf, the prosecutor confronted him on cross:

> And you would agree, wouldn't you, that it's logical to conclude that you were the man Karla Van Dusen was describing to Billie Ferris when she told her mom she was following Rick and the man that bought the truck?

(39)/3470)

Then in closing argument the prosecutor brought up Karla's statements to Billie Ferris three more times (40/3594,3699-3700,3704) and climaxed his presentation to the jury with a fourth reference, which was the coup de grace:

"And unbeknownst to Karla Van Dusen, she identified her killer to her mother on that telephone when she said I'm following Rick and the person who bought that truck. He knows where to get the paperwork done. She identified William Deparvine with her words..." (40/3709).

And now comes the state on appeal saying the hearsay evidence was introduced to show Karla's acts of subsequent conduct (SB29-31), and anyway it was harmless (SB31-35). The prosecutor's use of this evidence at trial refutes both contentions.

Harmless Error?

The state cites J.M. v. State, 665 So.2d 1135,1137 (Fla. 5th DCA 1996), for the proposition that "errors admitting hearsay statements are often harmless." (SB31-32). And that may well be true, often; but not in the instant case - - a complicated circumstantial evidence trial which the prosecutor simplified for the jury by portraying Karla's hearsay statement as an eyewitness identification from beyond the grave (40/3708-09). What J.M. actually says is, "Often errors regarding the admissibility of hearsay evidence are harmless because the same evidence is presented through a different source, or the evidence has no real significance in consideration of the merits of a case". 665 So.2d at 1137.

Appellant was convicted based entirely on circumstantial evidence. In its harmless error argument - - trying to create

the impression of "overwhelming evidence" without using the phrase - - the state has marshaled only its own testimony (SB32-34), presented in the light most favorable to itself (which would be appropriate if the state were responding to a sufficiency-of-the-evidence issue), and has omitted all of the circumstantial evidence presented in the defense's case (Martha Baker, for example)[2] or on cross-examination of the state's witnesses which might have raised a reasonable doubt in the minds of jurors, as well as all of the impeachment evidence calling into question the credibility of state witnesses (Paul Lanier, for example; consistently with the instructions on assessing the credibility of witnesses the jury may have disregarded Mr. Lanier's testimony in its entirety).[3] Misreading State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), the state says, "An error is harmless beyond a reasonable doubt when, after considering all the permissible

[2] Ms. Baker, a neighbor of the Van Dusens in Tierra Verde, testified that she heard Karla Van Dusen, whom she knew well, on her back porch talking with a male between 7:15 and 7:50 p.m.; a time frame inconsistent with the state's hypothesis that appellant was the killer (37/3137-54)

[3] The state contends in its harmless error argument that Lanier gave testimony contradictory to appellant's regarding the test drive (SB33-34). The state neglects to mention that Lanier was thoroughly impeached on cross (34/2731-61), and had made prior inconsistent statements describing the person he saw (34/2747-52). The state also neglects to mention that Lanier admitted to 13 or 14 prior felony convictions (34/2730-32). In addition, he was currently on probation in both Hillsborough County (burglary) and Polk County (driving on suspended license and giving a false name to law enforcement)(34/2730,2732-33). At the time of this trial, he was facing still more criminal charges in Pinellas County, as well as a pending violation of probation based on those charges (34/2730,2733-34).

evidence, a court concludes that there is no reasonable possibility that the error contributed to the jury's verdict. DiGuilio, 491 So.2d at 1135." (SB34)

What DiGuilio actually says is that application of the harmless error test "requires not only a close examination of the permissible evidence on which the jury could have legitimately relied, but an even closer examination of the impermissible

evidence which might have possibly influenced the jury verdict." 491 So.2d at 1138. "The focus is on the effect of the error on the trier-of-fact". 491 So.2d at 1139. And, "harmless error analysis must not become a device whereby the appellate court substitutes itself for the jury, examines the permissible evidence, excludes the impermissible evidence, and determines that the evidence of guilt is sufficient or even overwhelming based on the permissible evidence". 491 So.2d at 1136. Quoting California's former Chief Justice Traynor, this Court recognized in DiGuilio that "[o]verwhelming evidence of guilt does not negate the fact that an error that constituted a substantial part of the prosecution's case may have played a substantial part in the jury's deliberation and thus contributed to the actual verdict reached...." 491 So.2d at 1136.

In any event, appellant certainly does not concede that the evidence can be characterized as "overwhelming". Karla VanDusen's hearsay statement, presented through the testimony of her mother Billie Ferris, was a cornerstone of the state's case; it was the only evidence placing appellant with the Van Dusens at any time after he said they'd left his apartment complex, and it was the only evidence placing the red Chevy pickup truck anywhere north of central St. Petersburg where appellant lived, and where the truck was ultimately located during the police investigation.

The critical question, however, is whether this Court can

conclude beyond a reasonable doubt that Karla's statements, as highlighted by the prosecutor to the jury, could have had no significant impact on the jurors' deliberations or on their verdict. DiGuilio. The trial prosecutor, Mr. Pruner, obviously was convinced that it would have a tremendous impact. Six weeks prior to trial, he filed a sworn motion to take Billie Ferris' deposition to perpetuate her testimony concerning Karla's statements during their telephone conversation, asserting that Ms. Ferris was 72 years old and had recently suffered a minor stroke (which the prosecutor further asserted had not affected her memory). The prosecutor represented that the testimony "is material and not cumulative of the testimony of other witnesses" and that "[y]our applicant verily believes that this cause cannot be tried with justice to the State of Florida without said witness" (12/2076-77). When the defense moved to exclude Billie Ferris' testimony as hearsay not meeting the admissibility requirements of any applicable exception, the prosecutor fought vigorously to persuade the trial judge to allow its introduction, even to the extent of urging him not to follow the Hutchinson decision (1/140,145-47,157-63;2/222-29). In his brief opening statement to the jury, the prosecutor found this testimony worthy of three separate mentions (28/1808,1818,1822); he used it to cross-examine appellant on the issue of identity (39/3470); and he returned to this theme in his closing argument, focusing the jury's attention on

Karla's statements four more times (40/3594,3699-3700,3704,3708-09), including both the introductory first words (40/3594) and the emotionally charged last words the jury heard from him:

> Now, ladies and gentlemen, throughout a child's life, he or she sends unspoken messages to his or her mother. The infant's cry will trigger biological responses to the breast-feeding mother. The mother, from the mood of her child, can determine whether the child is happy or in love or afraid.
>
> And unbeknownst to Karla Van Dusen, she identified her killer to her mother on that telephone when she said I'm following Rick and the person who bought that truck. He knows where to get the paperwork done. She identified William Deparvine with her words and he left his blood at the scene and he was in possession of that truck that he coveted.
>
> Ladies and Gentlemen, I ask you to return a verdict of guilt as to all counts. It has been proven beyond and to the exclusion of every reasonable doubt. And thank you for your time and attention.

(40/3708-09).

Trial lawyers are well aware that jurors tend to remember what they hear first ("primacy") and what they hear last ("recency"). See Whiteplume v. State, 841 P.2d 1332,1340 (Wyo. 1992). That is why this Court has recognized that the opportunity to address the jury last is a "fundamental advantage which simply speaks for itself". Wike v. State, 648 So.2d 683,686-87 (Fla. 1994), quoting Raysor v. State, 272 So.2d 867,869 (Fla. 4th DCA 1973). It is not reasonable to believe that Mr. Pruner would have squandered this tactical advantage by repeatedly emphasizing, and then closing with, an

item of evidence so insignificant that it could not have had any impact on the jurors.

This Court and the District Courts of Appeal have consistently recognized that when the prosecutor emphasizes erroneously admitted evidence in his argument to the jury it (1) compounds the error and (2) precludes, in most instances, a finding of harmlessness. See Stoll v. State, 762 So.2d 870,878 (Fla. 2000)(prejudice Stoll suffered as a result of improper admission of hearsay statements "was exacerbated by the State's reliance on this evidence during closing arguments"); and see, e.g., Wike v. State, 596 So.2d 1020,1025 (Fla. 1992); Preston v. State, 564 So.2d 120,123 (Fla. 1990); Batten v. State, 895 So.2d 490,493-94 (Fla. 2d DCA 2005); Schusler v. State, 760 So.2d 271 (Fla. 4th DCA 2000); Barkley v. State, 750 So.2d 755 (Fla. 2d DCA 2000); Ferguson v. State, 697 So.2d 979,981 (Fla. 4th DCA 1997); Price v. Rizzuti, 661 So.2d 97 (Fla. 4th DCA 1995); Shipman v. State, 647 So.2d 226 (Fla. 1st DCA 1994); White v. State, 633 So.2d 472,474 (Fla. 1st DCA 1994); Guerrero v. State, 532 So.2d 75,77 (Fla. 3d DCA 1988); Lee v. State, 508 So.2d 1300,1303 (Fla. 1st DCA 1987), decision approved in State v. Lee, 531 So.2d 133 (Fla. 1988); Nelson v. State, 388 So.2d 1276 (Fla. 3d DCA 1980).

One further point regarding the state's "harmless error" claim needs to be made. This case provides an extreme example of a recurring tactic, in which the state first - - through

its representative at trial, the assistant state attorney - - litigates vigorously to persuade the trial judge to allow the introduction of a contested item of evidence, and then after securing a conviction - - through its representative on appeal, the assistant attorney general - - cavalierly proclaims (in effect) "Oh, that? We didn't need that anyway."

Undersigned counsel for appellant recognizes that, notwithstanding the prosecutor's concerted and successful effort to admit the challenged evidence, it is possible in a given case that it still may turn out to be insignificant or cumulative, or rendered harmless by developments at trial. See United States v. Cross, 638 F.2d 1375,1381 (5th Cir. 1981), as discussed in United States v. Hernandez, 750 F.2d 1256,1258-59 (5th Cir. 1985). But at the very least, an appellate court should look askance when the state attempts this sleight-of-hand maneuver, as this Court did in 1919 in Gunn v. State, 78 Fla. 599,83 So. 511 (1919):

> It is contended that * * * no harm could have been done by the admission of the sheriff's testimony. Then why was it offered by the state and admitted by the court? Surely not merely to consume time and swell the record? * * *Having gotten it before the jury over the objection of the defendant, and a conviction obtained, the state cannot be heard to say it was harmless error. Who can say that the testimony * * * did not and could not have the effect that the state's attorney intended?

See also Farnell v. State, 214 So.2d 753,764 (Fla. 2d DCA 1968)(quoting Gunn); State v. Clarke, 808 P.2d 92,94 n.1 (Or.App. 1991); State v. Newman, 568 S.W.2d 276,282 (Mo.App.

1978); United States v. Cross, supra, 638 F.2d at 1375; United States v. Hernandez, supra, 750 So.2d at 1256 (explaining that the reasons the error was nevertheless found harmless in Cross included the facts that judge instructed the jury to disregard the testimony, and the prosecutor did not attempt to exploit the testimony in closing argument).

ISSUE II (Indictment)

The state wrongly characterizes this wholly defective indictment as being only "technically" flawed (SB38-39,41), and proceeds on the assumption that as long as appellant knew (through discovery or other means) that the state intended to prosecute him under both theories of first degree murder he could not have been prejudiced by the indicment's failure to allege either of the alternative essential elements of first degree murder (see SB17-18,39-40,44).

Perhaps when a defendant is (or constitutionally can be) charged with a criminal offense directly by the State Attorney by information, then the prosecutor's intent - - and the defense's understanding of the prosecutor's intent - - may be highly significant. However, the Florida Constitution, Article I, Section 15(a), requires a valid grand jury indictment to commence prosecution for the capital crime of first degree murder; this requirement is jurisdictional. See

Johnson v. State, ____ So.2d ____ (Fla. 2007)[2007 WL 1933048], p.10; Lowe v. Stack, 326 So.2d 1 (Fla. 1974); Bell v. State, 360 so.2d 6 (Fla. 2d DCA 1978). When a first degree murder indictment fails to allege either premeditation or felony murder, there is no way to know which of these alternative elements the grand jury found, or whether it found both. A trial on such a fundamentally defective indictment allows the prosecution to obtain a capital conviction and death sentence based upon facts which may not have been found by the grand jury. See State v. Paetehr, 7 P.3d 708,712-13 (Ore.App. 2000). That is constitutionally and jurisdictionally impermissible, and that is the prejudice to appellant's substantial rights which requires reversal of his convictions and death sentences.

Ford v. State, 802 So.2d 1121,1130 (Fla. 2001), relied on by the state (SB40), is thoroughly distinguishable on several key grounds. First of all, while Ford does involve an indictment, the defendant's challenge was to a noncapital count (child abuse), to which the Florida constitutional right (and jurisdictional requirement) to be charged only by a grand jury does not apply. See Johnson v. State, supra, 2007 WL 1933048, p.10-11. Secondly, the indictment in Ford did not omit an essential element of the crime; "the text of the indictment stated specific grounds", 802 So.2d at 1130 and n.16. The defense's contention in Ford was that the grounds alleged could have supported a conviction of either simple

child abuse or neglect of a child; this Court found under these circumstances that "[a]ny inquiry concerning the technical propriety of the indictment" should have been raised before trial. 802 So.2d at 1130. [Note that subsequent appellate decisions citing Ford continue to recognize that charging documents which omit an essential element of the crime are fundamentally - - not just technically - - defective. McMillan v. State, 832 So.2d 946,947-48 (Fla. 5th DCA 2002); Smartmays v. State, 901 So.2d 278,280 (Fla. 5th DCA 2005)].

Ignoring its own heavy contribution to this fiasco (see appellant's initial brief, p.43-44), the state, as predicted, complains of "sandbagging" (SB17,36). Although a motion for a statement of particulars was filed before trial in which it was pointed out that the indictment failed to state whether the state was proceeding on a theory of premeditation or felony murder or both (11/1913-15), the state now contends that defense counsel "abandoned" the issue by failing to argue it orally (SB17,36), even though the trial judge specifically ruled that "[t]he motions will speak for themselves", and failure to orally argue each issue would not be construed as a waiver (19/697-98). [If counsel had been intentionally trying to sandbag the state, why bring it up in the pretrial motion in the first place, and risk the possibility that the prosecutor might read it?]. In any event, whether or not anything that occurred can be characterized as "sandbagging"

is immaterial, given the jurisdictional nature of the problem. Jurisdiction cannot be conferred even by express agreement of the parties, much less by a theory of waiver based on failure to orally argue a written motion. See Johnson v. State, supra, 2007 WL 1933048, p.11, quoting Akins v. State, 691 So.2d 587,588-89 (Fla. 1st DCA 1997).

ISSUE III (Jury Instructions Broadening Allegations in Indictment)

Crain v. State, 894 So.2d 59,67-70 (Fla. 2004)(see SB42-46) is in no way inconsistent with the caselaw which establishes that a trial court cannot constructively amend a grand jury indictment by giving jury instructions or by affording verdict options which broaden or expand the allegations contained in the indictment [see Ingleton v. State, 700 So.2d 735,739-40 (Fla. 5th DCA 1997); Huene v. State, 570 So.2d 1031 (Fla. 1st DCA 1990); Stirone v. United States, 361 U.S. 212,215-19 (1960); United States v. Miller, 471 U.S. 130,138-45 (1985)], nor is Crain inconsistent with the Florida precedent that a trial court commits fundamental error when it instructs the jury on an alternative element not charged in the indictment or information [see Eaton v. State, 908 So.2d 1164,1165 (Fla. 1st DCA 2005)(and cases cited therein); Hodges v. State, 878 So.2d 401 (Fla. 4th DCA 2004); Braggs v. State, 789 So.2d 1151 (Fla. 3d DCA 2001); Taylor v.

State, 760 So.2d 298 (Fla. 4th DCA 2000); Abbate v. State, 745 So.2d 409 (Fla. 4th DCA 1999)].

In the instant case, as the state acknowledges (SB17,42), defense counsel objected to the proposed verdict form on the ground that, due to the failure of the indictment to allege either premeditation or felony murder, "I think it gives the jury choices they don't really have" (40/3584-85). This was sufficient to preserve the issue, if preservation were required; but as Eaton, Hodges, Braggs, Taylor, and Abbate make clear, the error is fundamental anyway.

In Crain, the jury instruction given by the trial judge on the charged offense of kidnapping was correct and was not challenged on appeal; the indictment charged, and the jury instruction required the state to prove, that the kidnapping was done with the intent to commit or facilitate a homicide. 894 So.2d at 67-68. However, in separately instructing on kidnapping as a predicate felony for a felony murder conviction, the judge added another alternative element; i.e., that the kidnapping must be done with the intent to commit or facilitate a homicide or to inflict bodily harm on the victim. 894 So.2d at 68. No objection of any kind was made to the divergent instructions in Crain. On appeal, this Court reasoned that since under Florida law "it is well settled that if an indictment charges premeditated murder, the State need not charge felony murder or the particular underlying felony to receive a felony murder instruction", the trial judge did

not commit fundamental error by giving the divergent instructions. 894 So.2d at 69-70.

In the instant case, in contrast, the indictment did not charge premeditated murder (nor did it charge felony murder), and the jury was instructed on alternative elements of the primary offense which were not alleged in the grand jury indictment. As the state recognizes (SB43), the converse of the proposition stated in Crain is not true, and an indictment which charges only felony murder will not support an instruction which allows the jury to convict on a theory of premeditation. Ables v. State, 338 So.2d 1095 (Fla. 1st DCA 1976), see Lightbourne v. State, 438 So.2d 380,384 (Fla. 1983)(distinguishing Ables on the basis that in Ables premeditated murder was never alleged).

The state, citing Ables, argues that the error in instructing the jury on premeditated murder when premeditation was not alleged in the indictment "is harmless because the evidence overwhelmingly supports Appellant's conviction for first degree murder based on felony murder" (carjacking) (SB45, and 43 n.24). First of all, the indictment in this case, unlike the one in Ables, didn't charge felony murder either. Secondly, not only was the evidence that a carjacking occurred far short of "overwhelming", it was legally insufficient to prove the offense of carjacking, as to either of the two potential crimes (carjacking of the Chevy truck or carjacking of the Jeep Cherokee) which the state still cannot

make up its mind is the basis of the conviction.

ISSUE IV (Carjacking)

Risk of a Non-Unaminous Verdict

In a pretrial hearing concerning the admissibility of evidence regarding the Rolex watch [see Cross-Appeal Issue I], the state made it clear that the subject of the carjacking count was the Chevy truck:

> In arriving at whatever verdict the jury reaches - - the first bridge they've got to cross and inherent in their verdict is the paramount issue of how Mr. Deparvine got or received custody of the red classic pick-up truck of the Van Dusen's. That's also comprised in a count of the indictment alleging carjacking.
>
> The State's theory of the case and the State's proof will support its argument that Mr. Deparvine obtained this forcibly against their consent during the carjacking at or near the time of the Van Dusens' homicide.

(17/432,see 435,438).

The evidence at trial, however, did not establish when or under what circumstances appellant[4] obtained possession of the truck, and it certainly did not prove that it was by force as opposed to trickery. The state's hypothesis at trial was that at some point during the night appellant must have dropped off the truck at another location and then lured the Van Dusens to

[4] As in his initial brief, for purposes of the sufficiency argument as to carjacking, counsel will assume without conceding that appellant was the person who killed the Van

an isolated dirt road under false pretenses, where he caught them off guard and shot them in the front seat of their Jeep Cherokee (37/3095,see 14/2526). [The state on appeal also asserts as a fact that appellant parked the truck at an unknown location (SB50,52), when the evidence actually does not establish whether it was appellant or Rick who parked the truck, nor whether (or how) appellant had obtained possession of the truck at that time. See Eutzy v. State, 458 So.2d 755,758 (Fla. 1984) regarding the "utter void" in the evidence as to what may or may not have occurred prior to the shootings. Note also that the trial judge correctly granted defense counsel's motion for judgment of acquittal on the two kidnapping counts because there was no evidence that the Van Dusens were ever confined or transported against their wills].

At trial, during the argument on defense counsel's JOA motion, the prosecutor argued interchangeably that the truck was the subject of the carjacking (37/3089,3096), and that it was the jeep (37/3091). The judge, understandably confused, asked him to clarify his position, and the prosecutor now hypothesized that appellant had to carjack the Jeep in order to get back to wherever he'd left the truck (37/3097-98,3100).

In his closing argument to the jury, however, the prosecutor barely mentioned the carjacking charge, and he never argued the theory that it was the act of moving the jeep, in order to get back to where the truck was parked, that

(..continued)
Dusens.

constituted the charged carjacking; instead he presented to the jury the much simpler argument that appellant killed the Van Dusens because he coveted their truck and intended to acquire it by any means necessary (40/3661,3663,3705).

Submitting this case to the jury under an indictment and instructions which allowed them to convict without unanimous agreement as to which vehicle - - the truck or the jeep - - was the subject of the carjacking was fundamental error. Perley v. State, 947 So.2d 672 (Fla. 4th DCA 2007); see also State v. Weaver, 964 P.2d 713,717-21 (Mont. 1998); Ngo v. State, 175 S.W.3d 738 (Tex.Crim.App. 2005).

The state on appeal still doesn't think it needs to reach a firm decision on which vehicle it thinks was carjacked (see SB57). Ignoring the persuasive authority of Weaver and Ngo, the state attempts to distinguish Perley and Robinson v. State, 881 So.2d 29 (Fla. 1st DCA 2004) on the basis that here "the prosecutor...did not argue to the jury that they could convict Appellant of armed carjacking for stealing either the Jeep SUV or the 1971 truck" (SB56).

The appellate court in Perley wrote:

> The state's actions make the unanimity of the jury's verdict questionable, as some members of the jury could have determined that one incident constituted escape, while others on the jury could have determined that the other incident constituted escape, rather than agreeing unanimously that the same incident constituted escape. "As a state constitutional matter, a criminal conviction requires a unanimous verdict in Florida." Robinson v. State, 881 So.2d 29,30 (Fla. 1st DCA 2004). "Where a single count embraces two or more separate offenses, albeit in violation of the same statute,

> the jury cannot convict unless its verdict is unanimous as to at least one specific act." Id. at 31. "Where it is reasonable and possible to distinguish between specific incidents or occurrences...then each should be contained in a separate count of the accusatory document." State v. Dell'Orfano, 651 So.2d 1213,1216 (Fla. 4th DCA 1995).

In the instant case, if neither the trial prosecutor nor the Assistant Attorney General can decide or coherently explain which specific act was the subject of the charged carjacking, how were the jurors - - left to their own devices - - supposed to do it? Under the unique circumstances involved here, there is a constitutionally unacceptable risk that the jury convicted appellant of carjacking without reaching a unanimous agreement as to which act constituted the crime. And the risk is further enhanced by the fact that neither of the two possible acts truly fits the definition of a carjacking.

## Insufficiency of the Evidence (Truck)

The evidence does not show when or how appellant obtained possession of the truck. See Eutzy. The evidence does, however, show that the truck was not at the scene where the shooting occurred. Even under the broadest interpretation of a carjacking statute, this does not qualify. Compare State v. Edmondson, ____ S.W.2d ____, 2007 WL 2350248 (Tenn. 2007), in which the Supreme Court of Tennessee (after concluding that

that state's statute was broader than the federal carjacking statute and the statutes of a number of other states) held that the evidence was sufficient to support a carjacking conviction when the defendant forcibly demanded the keys to the vehicle, even though the victim was approximately three car lengths away from the vehicle at the time of the encounter. See also Alvarez v. State, ____ So.2d ____ (Fla. 3d DCA 2007)[2007 WL 1930656]("Here, as in Flores [v. State, 853 So.2d 566,569 (Fla. 3d DCA 2003)], the victim was unaware of the theft. We conclude, as we did in that case, that under these circumstances the legislature did not intend for a carjacking conviction to lie).

Insufficiency of the Evidence (Jeep)

The taking of property after a murder is not a robbery (and hence not a carjacking, see Alvarez v. State, supra) when the taking was not the motive for the murder. Mahn v. State, 714 So.2d 391,397 (Fla. 1998). Under the state's own hypothesis, the moving of the jeep from one location to another was not even a concurrent motive for the murders; it was done simply as part of an effort to avoid detection.

ISSUE V (Victim Impact)

The state, relying on Alston v. State, 723 So.2d 148,160 (Fla. 1998) and Hoskins v. State, ____ So.2d ____ (Fla.

2007)[2007 WL 1147291], argues "harmless error". In Hoskins, the issue on appeal was whether the trial court erred in failing to give a limiting instruction at the time the evidence was admitted. The judge in Hoskins did give a limiting instruction at the conclusion of all the evidence. This Court determined that "given that the trial court ultimately instructed the jury properly, the minimal amount of victim impact evidence presented, and the strong case for aggravation and the relatively weak case for mitigation, any error would be harmless beyond a reasonable doubt." In Alston, the state presented only a single victim impact witness, and exhibited one photograph of the victim during its penalty phase closing argument. See Branch v. State, 685 So.2d 1250,1253 (Fla. 1996).

Appellant's contention in the instant case, in sharp contrast to Hoskins and Alston, is that the state introduced excessive and unduly emotional victim impact evidence which became the overwhelming feature of the penalty phase, in violation of the Due Process Clause of the Fourteenth Amendment (a claim recognized as potentially valid by all nine Justices in Payne v. Tennessee, 501 U.S. 808 (1991)), and in violation of §90.403 of Florida's Evidence Code. If, after reviewing the victim impact evidence which the state put before appellant's jury (see initial brief, p.66-75), this Court were to conclude that it was not excessive and was not emotionally inflammatory, then appellant will lose this Point

on Appeal on the merits. But if this Court agrees with appellant's contention that the victim impact evidence was so excessive and emotionally charged as to become the feature of this one-day penalty proceeding, then that pretty much disposes of any "harmless error" claim. See Bowles v. State, 716 So.2d 769,773 (Fla. 1998); State v. DiGuilio, supra.

The state, in hindsight, seems to think that a death recommendation from the jury would have been a slam dunk no matter how it presented its penalty phase case (SB62). If that were true, then why pile on and risk reversal by introducing unnecessary inflammatory testimony before the jury? If the family members all strongly wished to testify the prosecutor could have called them during the Spencer hearing before the judge, who would have been much less likely than jurors to let emotion influence his decision. Moreover, even though newspaper accounts (the accuracy of which was not disputed by the prosecutor or the judge) reported that at least five jurors were crying during the family members' testimony, the vote recommending the death penalty was close (8-4). See Snelgrove v. State, 921 So.2d 560,571 (Fla. 2005)(vote breakdown can be a useful consideration in determining whether penalty phase error is harmful); Mahn v. State, 714 So.2d 391,398 (Fla. 1998)(where jury death recommendation was by an 8-4 vote, "we cannot conclude that the error was harmless beyond a reasonable doubt"). Therefore, since the state cannot show that its emotionally

charged victim impact presentation could not have swayed the votes of two or more jurors, its "harmless error" argument must fail.

ISSUE VI (Juror Rucker)

Undersigned counsel disputes the accuracy of the state's statements that "Mr. Rucker unequivocally stated that he would not allow the state to prove a capital case and sentence a defendant to death based on circumstantial evidence" (SB67), and "He indicated that circumstantial evidence would be sufficient to support a conviction, but he could not base a death sentence on circumstantial evidence" (SB67-68). The voir dire transcript shows that Mr. Rucker said no such thing (24/1298-1300,1372-73).

As for the state's claim that defense counsel waived his objection to the excusal for cause of Mr. Rucker by failing to articulate his grounds, while it is true that the trial judge didn't muzzle defense counsel, and he could have plowed ahead when the judge made it clear he was finished with the last juror and counsel should move on to the next guy (24/1387)(see SB66), appellant should not forfeit his right to relief for a constitutional error where the trial court interrupted counsel's attempt to articulate the grounds for his previously made objection. See Nieves v. State, 678 So.2d 468 (Fla. 4th DCA 1996).

ISSUE VII (Ring). Appellant will rely on his initial brief.

ISSUE VIII (Sentencing Order)

The state inaccurately claims that the trial court found all of the mitigators proposed by defense counsel except one; i.e., that the totality of the circumstances did not demonstrate that death was the appropriate penalty (SB74). The main nonstatutory mental mitigating factor offered by the defense was based on the Spencer hearing testimony and written report of Dr. Eric Rosen, who concluded that appellant suffers from several recognized psychiatric conditions (14/2493,2518-23;42/3979-83). Contrary to the state's assertion (SB73), Dr. Rosen's opinions were not "refuted" by the state's expert, Dr. Otto (see 42/4020-21,4025,4027). Moreover, the trial judge did not reject this mitigating evidence based on conflicting testimony, he simply ignored it (15/2561). In this respect, and in all respects, the judge failed to comply with the minimum requirements for evaluating mitigating circumstances set forth in such cases as Campbell v. State, 571 So.2d 415,419 (Fla. 1990); Ferrell v. State, 653 So.2d 367,371 (Fla. 1995); and Woodel v. State, 804 So.2d 316, 326-27 (Fla. 2001). "A sentencing order that comprehensively addresses all mitigation" is "absolutely essential" to meaningful appellate

review in capital cases. Woodel.

Cross-Appeal Issue I (Rolex Watch)

In applying the prejudice vs. probative value balancing test under §90.403 of the Evidence Code, the trial court "necessarily exercises its discretion." State v. McClain, 525 So.2d 420, 422 (Fla. 1988); Steverson v. State, 695 So.2d 687,688 (Fla. 1997); see Sims v. Brown, 574 So.2d 131,133 (Fla. 1991)("weighing of relevance versus prejudice or confusion is best performed by the trial judge who is present and best able to compare the two"). The prejudicial impact, in a circumstantial evidence murder trial, for the jury to hear that the defendant had recently served time in prison, is obvious, and it would be devastating to the presumption of innocence. See Palmer v. State, 548 So.2d 277 (Fla. 1st DCA 1989); Cornaetzer v. State, 736 So.2d 1217 (Fla. 5th DCA 1999); Bowers v. State, 929 So.2d 1199,1201 (Fla. 2d DCA 2006); see, generally, McCall v. State, 941 So.2d 1280,1283 (Fla. 4th DCA 2006)(evidence suggesting the defendant has committed other crimes "can have a powerful effect on the results at trial"). In the instant case, the prosecution wanted to introduce appellant's extensive statements in response to police interrogation concerning his acquisition of a Rolex watch in prison (see 3/376-77,385,389-90,394-95,401,413), so it could argue to the jury that appellant's statements were false (SB79,82,85).

[Contrary to the state's assertion, the prosecution was not able to "disprove" that appellant was able to hide contraband (the watch) in prison and smuggle it out of the Work Release Center; at best, the state could argue to the jury, based on the testimony of its correctional officer rebuttal witnesses, that it would have been difficult (See 38/3299-3300;39/3393-99,3455-57,3469,3534-37,3540-55,3558-59). Obviously, the fact that the correctional officers never discovered appellant in possession of a Rolex watch (39/3536-37,3543-44) is not inconsistent with appellant's testimony that he had one. Both correctional officers acknowledged that D.O.C.'s efforts to keep contraband out of the correctional facilities, and to prevent inmates from violating rules, are not foolproof (39/3544-46,3551-53); as Major Pitts put it, "Sure, you're going to miss something. [We're] all human" (39/3546)].

The prosecutor below made the following argument in opposing the defense's motion in limine:

> To allow the Defendant to suggest to the jury in this case that he legitimately purchased the victims' truck with the cash proceeds from the sale of a Rolex watch without reference to the purported manner of its acquisition of the watch would be to suggest that the existence of the watch was a fact uncontested by either investigating detectives or the prosecution. The jury would be misled by the evidence rather than enlightened by it. The State of Florida would be extremely prejudiced as a result of its inability to put the Defendant's assertion of innocence to an adversarial test. The jury necessarily would have to accept the Defendant's version as true and view the State's inability to discount his claim as an implicit stipulation by the State that a Rolex sale actually occurred.

(7/1240,see 17/436-37,439)(emphasis supplied).

At trial, appellant testified that he acquired the Rolex watch from a man named Bill Jamison, now deceased, whom he'd met in prison (38/3299-3300). Judge Padgett ruled at trial (agreeing with the prosecutor's argument that Judge Ficarrotta's pretrial order in limine was tentative and the issue was "in a whole different footing" once appellant took the stand and testified about the Rolex) that the door was now open for the state to cross-examine appellant about the circumstances under which he obtained the watch and brought it out of prison (37/3110-11,3119-21). And that is precisely what the state did (39/3393-99,3455-57,3469). The state also introduced testimony of correctional officers Pitts and Randolph in its rebuttal case (39/3540-55).

So, all of the state's expressed concerns about being able to challenge or contradict appellant's version were satisfied. Once appellant put the Rolex in issue before the jury, the prejudice vs. probative value calculus changed. Thus, Judge Ficarrotta did not abuse his discretion in granting the defense's motion in limine and preventing the state from prematurely and prejudicially injecting appellant's prior imprisonment into the trial. Likewise, Judge Padgett did not abuse his discretion at trial in allowing the state to cross-examine appellant regarding his acquisition of the Rolex in prison, and to introduce rebuttal testimony.

Trial court rulings in limine are entirely tentative, and subject to reevaluation in light of the developing evidence at trial. State v. Zenobia, 614 So.2d 1139 (Fla. 4th DCA 1993); Hawker v. State, 951 So.2d 945,950-51 (Fla. 4th DCA 2007). A party cannot complain on appeal (see SB85) of the exclusion of evidence which was subsequently introduced. See Heath v. State, 648 So.2d 660,665 (Fla. 1994); Holland v. State, 359 So.2d 28,29 (Fla. 3d DCA 1978); Henry v. State, 566 So.2d 29 (Fla. 4th DCA 1990); Alvarez v. State, 817 So.2d 1037,1038 (Fla. 3d DCA 2002).

Cross-Appeal Issue II (Statement Against Interest)

The trial judge also did not abuse his discretion in ruling that Rick Van Dusen's statements to his co-worker Peter Wilson were inadmissible. The judge made the following finding:

> In order for a statement to fall within §90.804(2)(c), Florida Statutes, the declarant must be aware of the risk of harm to his own pecuniary or penal interest at the time the statement is made. See Hunt v. Seaboard Coast Line R. Co., 327 So.2d 193 (Fla. 1976); Dinter v. Brewer, 420 So.2d 46 (Fla. 1st DCA 1983). In the case at hand, the Court does not find Mr. Van Dusen was aware of a risk of harm to his own penal interest or that a reasonable person would believe he would be subject to tax fraud charges and penalties stemming from a conversation with a co-worker or friend about the sale of his vehicle. See Lightbourne v. State, 644 So.2d 54 (Fla. 1994). As such, the statements to Mr. Wilson do not qualify under §90.804(2)(c), Florida Statutes and are excluded.

(2/254-55)

The state misinterprets the judge's reasoning as being based on Rick's presumed confidence that his friend could be trusted and wouldn't rat him out (see SB89-90). The cite to Lightbourne - - a case which indicates that the applicability of the statement against penal interest exception turns on whether a reasonable person would believe at the time of making the statement that he would be subject to a criminal penalty, 644 So.2d at 57 - - suggests otherwise. The law is clear, as the trial judge recognized, that the statutory exception requires that the person making the statement must have understood his or her own potential criminal liability. Smith v. State, 746 So.2d 1162,1168 (Fla. 1st DCA 1999); Evans v. Seagraves, 922 So.2d 318,320 n.2 (Fla. 1st DCA 2006); see also People v. Hayes, 21 Cal. 4th 1211,1257 n.4, 989 P.2d 645,673 n.4 (1999).

Where a declarant's statements would not tend to subject him to a criminal charge at the time the statement was made, they cannot be considered declarations against penal interest. See State v. Fredette, 462 A.2d 17,21-22 (Me. 1983); People v. Brownridge, 570 N.W.2d 672,678-79 (Mich. App. 1997), rev'd on other grounds, 591 N.W.2d 26 (Mich. 1999). Statements merely indicating an intent to commit an offense (or assist someone else in doing so) do not qualify. Fredette; Brownridge.

Filling out an invoice with a price less than the actual

sales price is not a criminal offense. In order to (arguably) be chargeable - - as an aider and abetter - - with misdemeanor sales tax fraud under Fla. Stat. §212.05(1), Rick Van Dusen would have had to do the further act of conveying the bill of sale to the buyer, who in turn would have had to do the further act of presenting the bill of sale to the tax collector in order to report a price less than the actual sales price. Unless and until those acts are done, there is no crime. [Rick's writing the invoice was, at most, mere preparation; it could not be "attempted sales tax fraud" for that reason, and also because the main offense - - reporting a false sales price to the tax collector - - is in itself an attempt; and therefore under the reasoning of Adams v. Murphy, 394 So.2d 411 (Fla. 1981) "attempted sales tax fraud" is a nonexistent crime. See Brown v. State, 550 So.2d 142,143-44 (Fla. 1st DCA 1989)(and cases cited therein); Cox v. State, 443 So.2d 1013,1015 (Fla. 5th DCA 1983)("[a]ttempted making of a false and fraudulent insurance claim is a nonexistent crime in Florida")].

Nothing Rick Van Dusen said to Peter Wilson could have subjected him to criminal prosecution at the time he made the statements. The trial judge did not err in ruling that they were not admissible under the declaration against penal interest hearsay exception.

## CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Assistant Attorney General Stephen D. Ake, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of September, 2007.

## CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

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