DOCKET NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

MANUEL ANTONIO RODRIGUEZ,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
APPENDIX

MARIE-LOUISE SAMUELS-PARMER
Special Assistant Capital Collateral Regional Counsel
Counsel of record

Capital Collateral Regional Counsel-South
1 East Broward Boulevard, Suite 444
Fort Lauderdale, FL 33301
(954) 713-1284

APPENDIX INDEX

A

Filing # 82061074 E-Filed 12/13/2018 11:12:59 AM

Supreme Court of Florida

No. SC18-1042

MANUEL ANTONIO RODRIGUEZ,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

December 13, 2018

PER CURIAM.

We have for review Manuel Antonio Rodriguez's appeal of the postconviction court's order denying Rodriguez's motion filed pursuant to Florida Rule of Criminal Procedure 3.851. This Court has jurisdiction. *See* art. V, § 3(b)(1), Fla. Const.

Rodriguez's motion sought relief pursuant to the United States Supreme Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and our decision on remand in *Hurst v. State* (*Hurst*), 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017). Rodriguez responded to this Court's order to show cause arguing why *Hitchcock v. State*, 226 So. 3d 216 (Fla.), *cert. denied*, 138 S. Ct. 513 (2017),

and *Rodriguez v. State*, 237 So. 3d 918 (Fla. 2018), *petition for cert. filed*, No. 18-6505 (U.S. July 2, 2018), should not be dispositive in this case.

After reviewing Rodriguez's response to the order to show cause, as well as the State's arguments in reply, we conclude that our prior denial of Rodriguez's postconviction appeal raising similar claims is a procedural bar to the claim at issue in this appeal, which in any event, does not entitle him to *Hurst* relief. *See Foster v. State*, No. SC18-860, 2018 WL 6379348 (Fla. Dec. 6, 2018); *Rodriguez*, 237 So. 3d at 919; *Hitchcock*, 226 So. 3d at 217. We previously affirmed the postconviction court's denial of Rodriguez's claims for *Hurst* relief pursuant to *Hitchcock*. *See Rodriguez*, 237 So. 3d at 919. In this case, relying on *Hurst* and the Legislature's amendments to Florida's capital sentencing scheme in response to *Hurst* pursuant to chapter 2017-1, Laws of Florida, Rodriguez contends that the elements of "capital murder" have existed since before *Hurst* and denying him relief amounts to a due process violation because he has not been found "guilty" of "capital murder." However, chapter 2017-1 codified the *Hurst* requirements, and, as we have previously explained, Rodriguez's three sentences of death were imposed following a jury's unanimous recommendations for death and became final in 2000. *See Rodriguez*, 237 So. 3d at 919. Therefore, because Rodriguez is not entitled to relief under *Hurst* or the legislation implementing the rights

recognized in *Hurst*, we affirm the denial of Rodriguez's motion. *See Rodriguez*, 237 So. 3d 919; *Hitchcock*, 226 So. 3d at 217.

The Court having carefully considered all arguments raised by Rodriguez, we caution that any rehearing motion containing reargument will be stricken. It is so ordered.

PARIENTE, LEWIS, QUINCE, POLSTON, LABARGA, and LAWSON, JJ., concur.
CANADY, C.J., concurs in result.

ANY MOTION FOR REHEARING OR CLARIFICATION MUST BE FILED WITHIN SEVEN DAYS. A RESPONSE TO THE MOTION FOR REHEARING/CLARIFICATION MAY BE FILED WITHIN FIVE DAYS AFTER THE FILING OF THE MOTION FOR REHEARING/CLARIFICATION. NOT FINAL UNTIL THIS TIME PERIOD EXPIRES TO FILE A REHEARING/CLARIFICATION MOTION AND, IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Miami-Dade County,
Nushin G. Sayfie, Judge - Case No. 131993CF025817B000XX

Neal Andre Dupree, Capital Collateral Regional Counsel, Marie-Louise Samuels Parmer, Special Assistant Capital Collateral Regional Counsel, and Marta Jaszczolt, Staff Attorney, Southern Region, Fort Lauderdale, Florida,

for Appellant

Pamela Jo Bondi, Attorney General, Tallahassee, Florida, and Rachel Kamoutsas, Assistant Attorney General, Miami, Florida,

for Appellee

B

IN THE SUPREME COURT OF FLORIDA

MANUEL ANTONIO RODRIGUEZ,

Appellant,

Case No.: SC18-1042

v.

STATE OF FLORIDA,

Appellee.

_____/

MOTION FOR CLARIFICATION AND/OR REHEARING

The Appellant**, MANUEL ANTONIO RODRIGUEZ**, by and through undersigned counsel, and pursuant to Fla. R. App. P. 9.330, files this motion for clarification and/or rehearing of this Court's opinion rendered December 13, 2018. Mr. Rodriguez submits that clarification is appropriate as this Court's opinion applies a procedural bar, but fails to express what form of *res judicata* the Court is relying on to bar the appeal. This Court should grant rehearing and clarify which doctrine the Court is applying so that Mr. Rodriguez can appropriately respond to this Court's opinion. No claim previously raised is hereby abandoned.

Mr. Rodriguez filed his notice of appeal on June 28, 2018, raising one claim. Mr. Rodriguez alleged that the Legislature, in amending Ch. 2017-1 following this

Court's rebuke in *Perry v. State*[1], crafted substantive law as evinced by the statute's applicability to crimes committed before its enactment date.[2] As a result, Mr. Rodriguez argued, he has not been found guilty of capital murder, *i.e.* first-degree murder plus the additional elements that must be found unanimously by a jury to support a death sentence. On August 7, 2018, this Court issued an Order requiring Mr. Rodriguez to show cause as to why the trial court's order should not be affirmed in light of this Court's decisions in *Rodriguez v. State*, 237 So. 3d 918 (Fla. 2018), and *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017).

[1] In *Perry v. State*, 210 So. 3d 630 (Fla. 2016), this Court first addressed the most important "changes" in the "new" statute before rejecting the Legislature's first attempt, Ch. 2016-13, for failing to require unanimity. This Court held that in order to "**increase** the penalty from a life sentence to a sentence of death" the jury must unanimously find the existence of each of the elements identified in *Hurst v. State* before considering the final recommendation. *Id*. at 640; *See* also, *Hurst v. State* at 53-54. However, this Court affirmed the Legislature's decision to maintain a bifurcated trial system involving the same elements that have been present since the Legislature's initial response to *Furman v. Georgia* in 1972.

[2] The State's assertion that Ch. 2017-1 does not evince a legislative intent for it to apply retroactively to all capital defendants, while based on faulty rationale, is ultimately correct. *See* Reply to Response at 11. According to the Florida Senate's Committee on Criminal Justice, all Florida senators are well aware of Florida's constitutional prohibitions on criminal laws. *See*, The Florida Senate, Issue Brief 2011-212, *Constitutional Prohibitions Affecting Criminal Laws*, https://www.flsenate.gov/UserContent/Session/2011/Publications/InterimReports/pdf/2011-212cj.pdf (last visited Dec. 18, 2018) ("A retroactive penalty enhancement or reduction is a savings clause violation because it affects punishment for crime previously committed). But fortunately, retroactivity is not at issue here, given that the elements in Ch. 2017-1 have been present since the Florida legislature first decided to create a bifurcated trial system in 1972.

In response, Mr. Rodriguez explained that this issue had not been addressed in *Hitchcock*. Specifically, *Hitchcock* did not address the due process implications related to Ch. 2017-1. *See* Response to OSC at 3-4. Mr. Rodriguez argued that because this Court merely clarified the plain language of the statute and the Legislature responded by confirming that construction, with the addition of the beyond a reasonable doubt standard and unanimity, and the fact that Ch. 2017-1 is being applied to crimes committed before enactment, the law is substantive. And because Florida's death penalty law, unlike other State's, requires unanimous jury findings as to each element before the ultimate vote, Mr. Rodriguez has not been properly convicted of the higher offense of capital first degree murder.[3]

---

[3] Although this Court recently held in *Foster* that the crime of "capital first degree murder" does not exist in Florida, Mr. Rodriguez submits this Court's reasoning in *Foster* defies the rationale in *Hurst v. State*. In *Hurst v. State*, this Court looked to what Florida law had done historically and realized that prior to *Furman*, whether a defendant lived or died was solely in the hands of the jury. Prior to 1972, the jury expressed whether a defendant would live or die in their verdict after a single-phase trial, *i.e*. the guilt phase. In response to *Furman*, Florida, unlike Arizona, decided to create a bifurcated trial system, where the jury would only play a secondary advisory role. In *Ring v. Arizona*, 536 U.S. 584, 612 (2002), Justice Scalia noted his concerns with this practice in his concurrence:

> "Second, and more important, my observing over the past 12 years the accelerating propensity of both state and federal legislatures to adopt "sentencing factors" determined by judges that increase punishment beyond what is authorized by the jury's verdict, and my witnessing the belief of a near majority of my colleagues that this novel practice is perfectly OK, cause me to believe that our people's traditional belief in the right of trial by jury is in perilous decline. That decline is bound to be confirmed, and indeed accelerated, by the repeated spectacle of a man's going to his death because *a judge* found that an aggravating factor existed. We cannot preserve our

In denying relief, this Court concluded that it's "prior denial of Mr. Rodriguez's postconviction appeal **raising similar claims** is a procedural bar to the claim at issue in this appeal," *see* Order at 2, yet the Court provided no authority or precedent to support such a procedural bar.[4] As a result, Mr. Rodriguez is at a loss to meaningfully understand this Court's ruling.

In *State v. McBride*, this Court made clear that the "[l]aw of the case principles do not apply unless the issues are decided on appeal." 848 So. 2d 287, 289 (Fla. 2003). In other words, the doctrine requires that the questions of law at issue were "***actually decided on appeal.***" *Id*. (emphasis added). This same principle is also true

---

> veneration for the protection of the jury in criminal cases if we render ourselves callous to the need for that protection by regularly imposing the death penalty without it." (internal citations omitted).

Justice Scalia concluded by noting that States could leave the life-or-death decision up to the judge so long as there is a "prior jury finding of aggravating factor in the sentencing phase or, more simply, by placing the aggravating-factor determination ***(where it logically belongs anyway) in the guilt phase***." *Id*. at 612-13. (emphasis added). Accordingly, Florida's choice to maintain its bifurcated trial system for capital cases does not give Florida the greenlight to circumvent the mandates of federal law. *See Bullington v. Missouri*, 451 U.S. 430 (1981) (Because Missouri enacted ***a bifurcated capital sentencing procedure which functioned like a trial on the issue of guilt or innocence***, the court held that the protections of the Double Jeopardy Clause of the Fifth Amendment applied) (emphasis added).

[4] This Court relies on *Foster v. State*, No. SC18-860, 2018 WL 6379348, *Rodriguez v. State*, 237 So. 3d 918 (Fla. 2018), and *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), to support the procedural bar, however it is unclear how any of these three cases would support barring litigation of Mr. Rodriguez's current claim. *Foster* was released on Dec. 6 2018, months after Mr. Rodriguez filed his appeal. Moreover, as explained above and in briefing, *Hitchcock* did not raise any claim related to Ch. 2017-1, let alone discuss its due process implications. Lastly, Mr. Rodriguez's prior appeal did not raise or address this particular claim. *See* Response to OSC at 2.

for the doctrine of judicial collateral estoppel. Collateral estoppel serves to prevent identical parties from re-litigation of the same issues that have already been decided. *McBride*, 848 So. 2d at 290. (citation omitted). It applies when an ***identical issue*** has been litigated between the same parties or their privies and was fully litigated and determined in a contest that results in a final decision of a court of competent jurisdiction. *Id*. at 291. (citation omitted).

In *Brown v. R.J. Reynolds Tobacco Co*., 611 F. 3d 1324 (11th Cir. 2010), the Eleventh Circuit was left with the task of deciphering what type of *res judicata* doctrine this Court had applied in the case at issue. The court noted the purpose of the doctrine is to prevent re-litigation of an issue that has been fully adjudicated, but warned, that collateral estoppel only applies if "the precise fact' or 'every point and question' on the issue must have been decided." *Id*. at 1334. *See also*, *Chandler v. Chander*, 226 So. 2d 697, 699 (Fla. 4th DCA 1969). Similarly, in *Porter v. Saddlebrooke Resorts, Inc*., 679 So.2d 1212, 1215 (Fla. 2nd DCA 1996), the court determined collateral estoppel could not apply because although "some of the issues are identical, other issues were either not litigated in [that proceeding] or not relevant in that proceeding." More importantly, courts have cautioned against using collateral estoppel against criminal defendants. *See United States v. Harnage*, 976 F.2d 633, 634-36 (11th Cir.1992) (rejecting the use of collateral estoppel against criminal defendants on the grounds of judicial economy).

Counsel is unable to decipher the meaning behind this Court's opinion and seeks clarification. It is unclear how Mr. Rodriguez, who was required by this Court to respond to a show cause order and distinguish his case from *Hitchcock* and *Rodriguez*, failed to do so. Clearly, the claim Mr. Rodriguez raised had not been litigated, let alone fully addressed, in *Hitchcock* because if that were true this Court would not have felt the need to resolve it in *Foster*. Mr. Rodriguez's claim may fail as a result of this Court's recent opinion in *Foster*, which is not yet final, however, Mr. Rodriguez cannot be barred by the cases this Court relies upon as any bar would be unevenly and capriciously applied.

Should this Court issue a clarification, Mr. Rodriguez would be able to thoroughly and accurately respond as to why neither the law of the case nor collateral estoppel applies to bar litigation of this particular appeal.

WHEREFORE, Mr. Rodriguez respectfully requests that this Court grant rehearing and clarify its December 13, 2018 opinion.

Respectfully submitted,

s/Marie-Louise Samuels Parmer
MARIE-LOUISE SAMUELS PARMER
Fla. Bar No. 0005584
Special Assistant CCRC-South
marie@samuelsparmerlaw.com

MARTA JASZCZOLT
Staff Attorney
Fla. Bar No. 119537
jaszczoltm@ccsr.state.fl.us

CCRC-South
1 East Broward Boulevard, Suite 444
Fort Lauderdale, FL 33301
(954) 713-1284
(954) 713-1299 (fax)

COUNSEL FOR RODRIGUEZ

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been filed through the Florida State Courts e-filing portal which electronically sent a copy to Melissa J. Roca Shaw, Assistant Attorney General, on this 20th day of December, 2018.

s/Marie-Louise Samuels Parmer
MARIE-LOUISE SAMUELS PARMER
Fla. Bar No. 0005584
Special Assistant CCRC-South

C

Filing # 82652685 E-Filed 12/28/2018 02:23:21 PM

Supreme Court of Florida

FRIDAY, DECEMBER 28, 2018

CASE NO.: SC18-1042
Lower Tribunal No(s).:
131993CF025817B000XX

MANUEL ANTONIO RODRIGUEZ vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

Appellant's Motion for Clarification and/or Rehearing is hereby denied.

CANADY, C.J., and PARIENTE, LEWIS, QUINCE, POLSTON, LABARGA, and LAWSON, JJ., concur.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

cd
Served:

MARTA JASZCZOLT
RACHEL KAMOUTSAS
MARIE-LOUISE SAMUELS PARMER
HON. HARVEY RUVIN, CLERK
CHRISTINE E. ZAHRALBAN
HON. NUSHIN G. SAYFIE, JUDGE

D

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

v.

MANUEL ANTONIO RODRIGUEZ,
Defendant.
_____/

CASE NO.: CASE NO. F93-25817B
DIVISION: F061
JUDGE NUSHIN G. SAYFIE

ORDER DENYING FIFTH SUCCESSIVE MOTION TO VACATE JUDGMENT AND SENTENCE PURSUANT TO RULE 3.851

This cause having come before the Court on Defendant's 5th Successive Motion to Vacate Sentence, and the Court having reviewed the Defendant's motion filed on 3/13/18, the State's Response filed on 4/25/18, and having heard arguments of the parties at the *Huff* hearing held on 4/26/18, finds as follows:

The facts and procedural history are set forth in the Defendant's Motion and the State's Response. For purposes of this motion, the relevant facts are that following jury trial, the Defendant was found guilty of three (3) counts of First Degree Murder and one (1) count of Armed Burglary with Assault. At the conclusion of the penalty phase, the jury recommended death by a vote of 12-0 on all three of the murder charges. Defendant was sentenced to death on January 31, 1997 for each of the murders, and life for the armed burglary. The Florida Supreme Court affirmed the convictions and sentences. *Rodriguez v. State,* 753 So.2d 29 (Fla. 2000). The United States Supreme Court denied certiorari on October 2, 2000. *Rodriguez v. Florida,* 531 U.S. 859 (2000).

In his prior motion, the Defendant sought to vacate his death sentences pursuant to *Hurst v. Florida*, 136 S.Ct. 616 (2016). This Court denied the motion following holdings of the Florida Supreme Court in *Asay v. State*, 210 So. 3d 1, (Fla. 2016), that *Hurst* does not apply retroactively to death sentences that were final before *Ring v. Arizona,* 536 US 584 (2002). *Id.*, at 22. The Defendant's sentences were final in 2000 prior to *Ring*. This decision was affirmed on appeal, *Rodriguez v. State*, 237 So.3d 918 (Fla. 2018). In that decision the FSC dismissed all of Rodriguez's arguments, *Id.* at 919, citing *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017). In *Hitchcock* the Court held:

> Although Hitchcock references various constitutional provisions as a basis for arguments that *Hurst v. State* should entitle him to a new sentencing proceeding, these are nothing more than arguments that *Hurst v. State* should be applied retroactively to his sentence, which became final prior to *Ring*. *Id.* at 217.

In his current motion, the Defendant raises one claim, reasserting his previously raised *Hurst* arguments as violations of Chapter 2017-1 of the Laws of Florida, aka the newly revised death penalty statute Fla. Stat. Sec. 921.141. This law is simply a codification of *Hurst* and its progeny. As stated in its prior order and as affirmed and re-stated by the FSC, Mr. Rodriguez is simply not entitled to relief because his death sentences were final before *Ring*.

And finally, this Court reiterates, that while the Defendant does not get the benefit of *Hurst* review, in his case, there were three separate unanimous jury death sentence recommendations and the jury found the Defendant guilty of four (4) concurrent felonies. Each death recommendation was supported by a guilty verdict on three other counts, which is a unanimous jury finding of the existence of three (3) aggravators. While there is no way to determine what weight the jury gave these aggravators, if any, there is clear record support that the jury unanimously found that they existed. In reviewing the harmless error analysis that the FSC has undertaken in *Hurst* review, it appears that Mr. Rodriguez's case is a far stronger case for harmless error than others death sentences upheld by the Court.

WHEREFORE, it is ORDERED AND ADJUDGED that the Defendant's Fifth Successive Motion to Vacate Judgment and Sentence is DENIED.

Done and Ordered in Miami-Dade County this 30th day of April, 2018.

Nushin G Sayfie
Circuit Court Judge

Copies to:
Marie-Louise Samuels Parker, counsel for Defendant
Marta Jaszczolt, counsel for Defendant
Melissa Roca Shaw, AAG
Gail Levine, ASA

E

☒ IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA.
☐ IN THE COUNTY COURT IN AND FOR DADE COUNTY, FLORIDA. 153

DIVISION	JUDGMENT	CASE NUMBER
☒ CRIMINAL ☐ OTHER	☐ Probation Violator ☐ Retrial ☐ Community Control Violator ☐ Resentence	93-25817-B

THE STATE OF FLORIDA VS.

MANUEL ANTONIO RODRIGUEZ
aka TONY

PLAINTIFF DEFENDANT

CLOCK IN

The Defendant, MANUEL ANTONIO RODRIGUEZ, being personally before this Court represented by K. HOULIHAN & E. ZENOBI, his attorney of record, and the State represented by A. LAISER/R. SOLLY/A. GAY Assistant State 's Attorney, and having:

☒ been tried and found guilty ☐ entered a plea of guilty ☐ entered a plea of nolo contendere to the following crime(s):

COUNT	CRIME	OFFENSE STATUTE NO.	DEGREE OF CRIME	OBTS NO.
1thru 3	FIRST DEGREE MURDER with a firearm	782.04(1), 775.087 & 777.011	1F	
4	BURGLARY WITH ASSAULT OR BATTERY IN AN OCCUPIED DWELLING	810.02	1F	

and no cause being shown why the Defendant should not be adjudicated guilty, IT IS ORDERED THAT the Defendant is hereby ADJUDICATED GUILTY of the above crime(s).

FH 11/1/96

CLK/CT 401 Rev 6/94

RECORDED
NOV 12 1996
Clerk of Circuit
& County Courts

OFF REC BK
17424PG0298

879

Defendant Manuel Antonio Rodriguez Case Number F93-358178

CHARGES/COSTS

The Defendant is hereby ordered to pay the following sum if checked:

- [X] Fifty dollars ($50.00) pursuant to F.S. 960.20 (Crimes Compensation Trust Fund).
- [X] Three dollars ($3.00) as a court cost pursuant to F.S. 943.25(3) (Criminal Justice Trust Fund)
- [X] Two dollars ($2.00) as a court cost pursuant to F.S. 943.25(13) Criminal Justice Education by Municipalities and Counties.
- [ ] A fine in the sum of $ _____ pursuant to F.S. 775.0835. (This provision refers to the optional fine for the Crimes Compensation Trust Fund, and is not applicable unless checked and completed. Fines imposed as a part of a sentence to F.S. 775.083 are to be recorded on the Sentence page(s).)
- [ ] Twenty dollars ($20.00) pursuant to F. S. 939.015 (Handicapped and Elderly Security Assistance Trust Fund).
- [ ] A 10 percent surcharge in the sum of $ _____ pursuant to 775.0836 (Handicapped and Elderly Security Assistance Trust Fund).
- [X] A sum of $ 200.00 pursuant to 27.3455 (Local Government Criminal Justice Trust Fund).
- [ ] Restitution in accordance with attached order.
- [ ] Other _____

Judge
LESLIE B. ROTHENBERG

FINGERPRINTS OF DEFENDANT

1. R. Thumb	2. R. Index	3. R. Middle	4. R. Ring	5. R. Little
				
1. L. Thumb	**2. L. Index**	**3. L. Middle**	**4. L. Ring**	**5. L. Little**
				

Fingerprints taken by: Marshall 3046
Name Title

I HEREBY CERTIFY that the above and foregoing are the fingerprints of the Defendant, _____ and that they were placed thereon by said Defendant in my presence in Open Court this date.

DONE AND ORDERED in Open Court in Dade County, Florida this 24th day of October, 19 96.

JUDGE
LESLIE B. ROTHENBERG

OFF REC BK
17424PG0299

874

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

CRIMINAL DIVISION

THE STATE OF FLORIDA,

CASE NO.: 93-25817(B)

JUDGE: LESLIE ROTHENBERG

vs.

MANUEL ANTONIO RODRIGUEZ
Defendant.
_____/

FILED
JAN 31 1997
J. HERNANDEZ
CLERK

SENTENCING ORDER

On October 24, 1996, after trial by jury, the Defendant was found guilty and adjudicated guilty for the First Degree Murders of Bea Sabe Joseph, Sam Joseph, and Genevieve Abraham and for one count of Armed Burglary With An Assault which were committed on December 4, 1984.

On December 12, 1996, after hearing and considering additional evidence, arguments of counsel, and the instructions given by the Court during the penalty phase proceedings, the jury recommended unanimously by a vote of 12-0 for the imposition of the death penalty as to each of these First Degree Murders.

On January 10, 1997, this Court heard additional testimony and argument by counsel and submitted to the Court file and to the attorneys, several letters received by the Court from the Defendant's friends. Subsequent to that hearing, this Court also received a letter from the Defendant's relatives and from the Defendant.

OFFICIAL RECORD

17526 PG 3200

1733

Pursuant to Section 921.141 of the Florida Statutes, this Court is required to consider each and every aggravating and mitigating circumstance set forth by the statute. Having heard all of the evidence introduced during the course of the trial and the evidence introduced during the penalty phase, and having considered the arguments of counsel made orally and in writing in the sentencing memorandums presented, and having considered the letters submitted by the Defendant, his family, and his acquaintances, this Court now addresses those issues. In doing so, this Court is mindful that the Defendant is entitled to an individual consideration of each of the aggravating and mitigating circumstances.

AGGRAVATING CIRCUMSTANCES

THE CAPITAL FELONY WAS COMMITTED BY A PERSON UNDER SENTENCE OF IMPRISONMENT. FLA STAT. 921.141(5)(a) (1984)

The evidence presented establishes beyond all reasonable doubt that the Defendant was under a sentence of imprisonment when he committed these three homicides.

On May 21, 1980, the Defendant was sentenced to five (5) years state prison for the Armed Robbery committed in Case No.: 77-25770 (State Exhibit #2) and to probation for the Armed Robbery he committed in Case No. 77-25553 (State Exhibit #1). These two sentences were ordered to run concurrent.

Officer Denise Felix, from the Department of Corrections, testified that the Defendant was released from prison on parole on February 17, 1981. This testimony was substantiated by the Certificate of Parole, introduced as State Exhibit #17. On November 22, 1982, a parole warrant

OFFICIAL RECORD

was issued by the parole commission after the Defendant had absconded from supervision and his whereabouts became unknown. (State Exhibit #18). That warrant was outstanding on December 4, 1984, when the Defendant entered the home of Bea Sabe Joseph and Sam Joseph, armed with a firearm and murdered Bea Sabe Joseph, Sam Joseph, and Genevieve Abraham.

As the Defendant was still under a sentence of imprisonment for Armed Robbery in Case No. 77-25770 and had totally absconded from his supervision, with an outstanding parole warrant in effect at the time of these homicides, this Court gives this aggravating circumstance great weight.

THE DEFENDANT WAS PREVIOUSLY CONVICTED OF ANOTHER CAPITAL FELONY OR OF A FELONY INVOLVING THE USE OR THREAT OF VIOLENCE TO THE PERSON. FLA STAT. 921.141(5)(b).

The State has proven beyond and to the exclusion of every reasonable doubt that the Defendant has been previously convicted of seventy-one (71) felonies involving the use or threat of violence to a person prior to his convictions for the murders of Bea Sabe Joseph, Sam Joseph and Genevieve Abraham.

As previously discussed, the Defendant was actually on parole for a violent felony when he committed these killings.

On May 21, 1980, in Case No.: 77-25553 the Defendant was convicted of Armed Robbery (State Exhibit #1). Detective Ron Ilhardt testified that on May 17, 1977, at approximately 1:40 a.m., the Defendant and another man entered the Dupont Plaza Hotel in downtown Miami, armed with a firearm. The Defendant confronted the clerk, ordered the clerk to lie on the floor and took

OFF.REC.BK.

$120.00 from the cashier. During the course of the robbery, the clerk attempted to flee and ran into the second suspect, causing the clerk and the second suspect to fall down the escalator. When a janitor on the first floor tried to assist, the Defendant hit him over the head with his gun and fled with the Co-Defendant, in a car with a license plate which had been covered. The Defendant was positively identified by the cashier.

On May 21, 1980, the Defendant was also convicted in Case No.: 77-25770, for the Armed Robbery he committed on June 3, 1977, at the Zagami Supermarket. (State Exhibit # 2). Detective Ilhardt, who was also the lead investigator of this robbery, testified that the Defendant entered the supermarket, pointed a semi-automatic firearm at the cashier and ordered him to "give up the money". The Defendant fled after the cashier handed over the money. The cashier positively identified the Defendant as the armed gunman who robbed him on June 3, 1977.

As discussed earlier, the Defendant was sentenced to five (5) years state prison for the robbery in Case No.: 77-25770 and to probation in Case No.: 77-25553 on May 21, 1980. On February 17, 1981, the Defendant was released on parole. On July 8, 1982, while on parole and while on probation and prior to the commission of these homicides, the Defendant entered a U-Totem Store in Miami, removed a gun from his waistband and pointed it at the clerk. The clerk who had seen the Defendant arrive and enter the store, became immediately suspicious of the Defendant when he saw the Defendant exit the car wearing a coat on this hot July day. When the Defendant pulled out a gun, the clerk also pulled out his own gun and held the Defendant until the police arrived. Upon investigation, the police learned that the vehicle the Defendant arrived in was stolen. The Defendant was arrested for Carrying a Concealed Firearm and Grand Theft Auto. After being advised of his rights, the Defendant also admitted that he knew the car

OFF-REC OK

was stolen and had entered the store to commit a robbery. The Defendant told the police that his name was Antonio Heres Chait and also provided a false date-of-birth. As a result of this mis-information, the Defendant was not identified as the Manual Rodriguez on parole for Armed Robbery and on probation for a second Armed Robbery and on September 14, 1982 the Defendant was convicted and was released on probation. (State Exhibit #23, Case No.: 82-16613).

On November 22, 1982, a warrant for parole violation was issued. The warrant reflected that the Defendant had absconded from supervision and had not reported since June, 1982.

On December 4, 1984, the Defendant committed the homicides of Bea Sabe Joseph, Sam Joseph, and Genevieve Abraham. While the police were investigating these murders, with a parole warrant still pending in the system and after being convicted and placed on probation for the Armed Robbery committed in Case No.: 77-25553 and for the felony crimes in Case No.: 82-16613, the Defendant committed the following felony crimes involving violence or threat of violence to another person. Sergeant William Kean testified that on October 22, 1985, at approximately 10:00 p.m. Ms. Gutierrez and Ms. Mink were confronted by the Defendant outside of the Ramada Inn at 7250 N.W. 11th Street. The Defendant, armed with a gun, ordered the two women to get into their vehicle. He then forced them to remove their jewelry and place their purses on the console. After forcing one woman to place the keys in the ignition, he told them to get out of the car, cautioning them that he had an accomplice in another car watching and that the second man was armed with a shotgun. Two days later, one of the victims saw the Defendant at Montys Bayshore Restaurant and immediately notified an off-duty officer, Officer Morales. When Officer Morales approached the Defendant, the Defendant fled. Officer Morales

[OFF REC BK]
17526 PG 3204

pursued the Defendant and eventually was able to apprehend him after a struggle. Further investigation uncovered the victim's 1985 Nissan 200XS in the parking lot, the keys to the car in the Defendant's pocket, and a woman who the Defendant had picked up in the car for a date. When the Defendant was arrested, he told the police he was Antonio Travis and gave his date of birth as December 13, 1955. The Defendant was convicted on May 6, 1986 of two counts of Armed Robbery and one count of Possession of a Firearm While Engaged in a Felony Offense, under Case No.: 85-30255 and sentenced to ten (10) years state prison. The Judgement and Sentence was introduced. (State's Exhibit #24). The Defendant's probation was also violated in Case Nos.: 77-25553 and 82-1613 and he was sentenced to ten (10) years on the 1977 case and five (5) years on the 1982 case. All sentences were ordered to run concurrent. Despite the ten (10) year sentence imposed, the Defendant was again out of custody by the beginning of 1988. Upon his release, the Defendant went on what can only be called a violent crime spree, involving multiple locations, multiple establishments and multiple victims resulting in an absolutely incomprehensible number of convictions involving the use or threat of violence to a person. These offenses began in February of 1988 and continued until the Defendant's arrest on January 19, 1989.

Detective Joe Castillo testified as to the facts of the first of these Robberies, Case No.: 89-3624, which occurred on February 20, 1988. The Defendant and a second subject entered and ordered food at the counter of a Burger King located at 6800 S.W. 8th Street. The Defendant, who was later identified by the manager George Le Fleur, produced a firearm, jumped the counter, and ordered the victims to the floor. The Defendant took the money from the register and then directed the manager at gunpoint, to the office, where he ordered him to open the safe.

OFF REC BK
17526 PG 3205 1743

The Defendant then took the money from the safe and also took the manager's watch. This crime went unsolved until the Defendant's arrest in 1989. On May 4, 1992, the Defendant pled guilty to Armed Robbery, Armed Kidnapping, Armed Burglary With An Assault, Carrying a Concealed Firearm, and Possession of a Firearm By a Convicted Felon. A certified copy of the Judgement and Sentence was introduced. (State Exhibit #3).

Three weeks later the Defendant selected a McDonald's, located at 901 S.W. 42nd Street to victimize. Detective Castillo testified that on March 17, 1988 the Defendant, this time working alone, ordered food from a young nineteen (19) year old cashier, Ms. Mesa, and while placing his order produced a chrome revolver, placed it to the cashier's forehead, and ordered everyone to the floor, telling them that this was a robbery. The Defendant then ordered another young female employee, twenty (20) year old Ms. O'Connor, to get up and to take him to the office safe. When they entered the office, they found another employee, Ms. Wallace there. When Ms. O'Connor was unable to open the safe, the Defendant ordered Ms. Wallace to open it. The Defendant fled with the money in a pillow case. Ms. Mesa was able to positively identify the Defendant and on January 19, 1989 after being advised of his rights, the Defendant admitted to Detective Gerry Starkey that he had committed this robbery. On May 4, 1992, the Defendant pled guilty to Armed Robbery, Aggravated Assault, Armed Kidnapping, Carrying a Concealed Firearm and Possession of a Firearm By a Convicted Felon. A certified copy of the Judgement and Sentence, Case No.: 89-3090 was introduced. (State's Exhibit #6)

Detective Gerry Starkey provided the evidence regarding the April 30, 1988 robbery of a Burger King restaurant on Coral Way. The facts of this robbery are nearly a mirror image of the prior Burger King and McDonald's robberies. The Defendant entered the restaurant, began

OFF REC BK
17526 PG 3206

ordering food, pulled out a chrome colored revolver, and jumped the counter. He then held the manager, Reggie Miller at gun point while threatening the other employees and a female customer who was in the store at the time. The Defendant then directed the manager to open the safe. After taking the money from the safe, the Defendant also took the manager's watch, jewelry, and money. When the Defendant was arrested on January 19, 1989, the Defendant confessed to having committed this robbery. On May 4, 1992, the Defendant pled guilty to the charges in this case, Case No.: 89-3205 and was convicted of Armed Robbery, Armed Kidnapping, Aggravated Assault, Carrying a Concealed Firearm and Possession of a Firearm While Engaged in a Criminal Offense. A certified copy of the Judgement and Sentence was introduced as evidence. (State Exhibit #13).

The facts regarding the next robbery which took place at an establishment called Luna Beds, located at 12260 S.W. 8th Street, Case No.: 89-2712, was also provided by Detective Starkey. He testified that on September 14, 1988, the Defendant entered the store and inquired about purchasing a medical bed for his mother and then left the store. Later, he returned brandishing a revolver. The Defendant robbed the two victims, Mr. and Mrs. Luna, taking money and jewelry valued at $16,000. He then forced the Luna's into a bathroom, telling them that he had an accomplice outside with a shotgun, and fled the store. The Defendant pled guilty on May 4, 1992 to two counts of Armed Kidnapping, one count of Armed Robbery, Carrying a Concealed Firearm and Possession of a Firearm by a Convicted Felon. A certified copy of the Judgement and Sentence was introduced as State Exhibit #14.

Detective Starkey also testified regarding the facts of the next two robberies which were committed in October and November of 1988. These two robberies were committed using the

OFF REC OR

same scenario or plan as was used in the Luna Beds robbery.

On October 5, 1988, the Defendant entered Indoor Florist Shop located at 7263 S.W. 57th Avenue and inquired about purchasing some roses. The Defendant was well dressed. As in the Luna Beds robbery, the Defendant left and returned with a chrome or stainless steel revolver which he held to the victims' heads and threatened to harm them if they did not comply with his demands. the Defendant robbed the victims, both women, of their jewelry and then forced them into the back of the store. When interviewed about this case on January 19, 1989, the Defendant told Detective Starkey that he had entered the store earlier so he could case the place out. On May 4, 1992, the Defendant pled guilty to two (2) counts of Armed Robbery, two (2) counts of Armed Kidnapping, Aggravated Assault, Carrying a Concealed Firearm, Possession of a Firearm by a Convicted Felon and Possession of a Firearm While Engaged in a Criminal Offense, Case No.: 89-2711. A certified copy of the Judgement and Sentence was introduced. (State Exhibit #15)

On November 11, 1989, the Defendant entered Fantasy Travel, a travel agency located at 10766 S.W. 24th Street inquiring about the prices for various travel packages and left. Later that day, he returned, pointed a chrome revolver at the victims and ordered them to lie on the floor. The Defendant robbed the victims of their money and jewelry and took the money from the safe. He placed the items in a bag he had brought with him for this purpose. He then moved the victims to the back of the store, locking them in and left the store. The Defendant was subsequently identified by a photo line-up and confessed to the crimes committed during this robbery. During this confession, the Defendant told Detective Starkey that "he had done something very bad and someone had been hurt..." On May 4, 1992, the Defendant pled guilty

OFF REC BK

to three (3) counts of Armed Kidnapping, three (3) counts of Armed Robbery, Carrying a Concealed Firearm and Possession of a Firearm by a Convicted Felon, Case No.: 89-3442, and a certified copy of these convictions was introduced. (State Exhibit #16)

The robbery of Clothestime was also committed in November of 1988. Detective Castillo, who investigated that case, testified that the Defendant entered the store located at 8435 S.W. 24th Street on November 24, 1988, initially acting as though he was going to purchase items. He was clean shaven and nicely dressed. After a few moments, the Defendant confronted the eighteen (18) year old female clerk behind the register, and another eighteen (18) year old female with a chrome revolver and told them "This is a stick up." He ordered the clerk behind the register to give him all of the money in the register and to put the money in a bag he had brought in with him. The Defendant forced both women into the bathroom and took their jewelry. Both Ms. Copa and Ms. Diaz were able to positively identify the Defendant as the armed gunman. On May 4, 1992, the Defendant pled guilty to two (2) counts of Armed Robbery, two (2) counts of Armed Kidnapping, Carrying a Concealed Firearm and Possession of a Firearm by a Convicted Felon, Case No.: 89-3266 and a certified copy of the Judgement and Sentence was introduced. (State Exhibit #5)

Detective Castillo also testified as to the robbery committed on January 3, 1989, at Burger King located at 6800 S.W. 8th Street. What is interesting about this particular robbery is that the Defendant who decided to go back to robbing fast food restaurants, returned to the same Burger King he had committed a robbery at less than one year earlier on February 20, 1989, and that the Defendant also reverted back to his earlier modes operandi. The Defendant entered the restaurant, went to the counter, began ordering food, jumped the counter, pulled out a gun and

OFF REC BK

ordered everyone to lie on the floor. The two victims were young teenagers, only fifteen (15) and sixteen (16) years old. As the Defendant was stuffing the money from the register into a bag, the manager came out from the back room. The Defendant forced the manager to the back room, made him open the safe, and cleaned out the safe as well. All three victims positively identified the Defendant. On May 4, 1992, the Defendant pled guilty to Aggravated Assault, Carrying a Concealed Firearm, Possession of a Firearm by a Convicted Felon, two (2) counts of Armed Robbery and two (2) counts of Armed Kidnapping, Case No.: 89-3089. A certified copy of the Judgement and Sentence was introduced. (State Exhibit #4)

One week later the Defendant committed a robbery at Fabric King, located at 7556 S.W. 117th Avenue. Detective Jeff Lewis, who investigated this case and testified that the Defendant entered the store on January 11, 1989, confronted the employees, pointed a chrome revolver at the victims' heads and demanded that the victims hand over the money from the store, their jewelry, and their purses. He told the victims that he had someone else outside who was "more dangerous" than he was. The Defendant eventually forced the victims into a bathroom and ordered them to wait as he fled with the property. The victims were able to positively identify the Defendant as the armed gunman who robbed them. On May 4, 1992, the Defendant pled guilty to three (3) counts of Armed Robbery, two (2) counts of Armed Kidnapping, Carrying a Concealed Firearm and Possession of a Firearm By a Convicted Felon, Case No.: 89-3204. A certified copy of the Judgement and Sentence was introduced. (State Exhibit #12).

The following week, on January 19, 1989, the Defendant committed a robbery at a Burger King located at 12500 S.W. 8th Street. Both Detective Lewis and Detective Starkey testified as to the facts of that case. On January 19, 1989, the Defendant entered the restaurant carrying a

OFFICIAL RECORD
17526PG3210

police scanner. He produced a firearm, jumped the counter and forced the manager to give him the money from the register and from the safe and to give the Defendant his jewelry. The Defendant put these items into a maroon bag and left. The nine victims held at gunpoint were of the following ages: one (1) was 24, two (2) were 23, one (1) was 21, two (2) were 17, and three (3) were only 16 years old. A BOLO was issued for the car the Defendant was seen leaving in and the car was stopped on S.W. 56th Street and 137th Avenue. The police scanner, a chrome revolver (State Exhibit #7) and the maroon bag with the vicims' property were recovered from the vehicle. A picture of the bag (State Exhibit #9) and a picture of the police scanner (State Exhibit #10), were also introduced. These nine (9) victims were all able to identify the Defendant. The Defendant pled guilty on May 4, 1992 to Armed Kidnapping, three (3) counts of Armed Robbery, three (3) counts of Aggravated Assault, Carrying a Concealed Firearm, and Possession of a Firearm by a Convicted Felon, Case No.: 89-2713. A certified copy of the Judgement and Sentence was introduced. (State Exhibit #11).

If my calculations are correct, these convictions represent twenty-three (23) separate convictions for Armed Robbery with a Firearm, seventeen (17) convictions for Armed Kidnapping With A Firearm, seven (7) convictions for Aggravated Assault With A Firearm, one (1) conviction for Armed Burglary With An Assault, ten (10) convictions for Carrying a Concealed Firearm, nine (9) convictions for Possession of a Firearm By a Convicted Felon, three (3) convictions of Possession of a Firearm While Engaged in a Criminal Offense and one (1) count of Grand Theft Auto. It should be noted that the conviction for Grand Theft Auto was in conjunction with one of the convictions for Carrying a Concealed Firearm in Case No.: 82-16613, wherein the Defendant entered a store, pulled out a gun in an attempt to commit a robbery and

OFF.REC.BK
17526 PG 3211

was confronted by the manager who armed himself with a gun and held the Defendant for the police. After Miranda, the Defendant admitted that he had entered the store intending to commit a robbery.

These convictions add up to the staggering number of seventy-one (71) prior violent felony convictions. The Defendant also stands convicted in the case before this Court for sentencing, for three counts of First Degree Murder. Each of these contemporaneous homicides may be considered as an additional violent felony and weighed with the seventy-one (71) prior convictions in determining the appropriate sentence to impose as to the murder of each victim. Craig v. State, 510 So. 2d 857 (Fla. 1987).

As the State has proven beyond every reasonable doubt seventy-one (71) prior felony convictions involving the use or threat of violence to a person and two contemporaneous First Degree Murders as to each victim, this Court gives very great weight to this aggravating circumstance. To avoid any possible doubling of aggravating circumstances, this Court did not consider the contemporaneous conviction for Armed Burglary with an Assault.

THE CAPITAL FELONY WAS COMMITTED WHILE THE DEFENDANT WAS ENGAGED, OR WAS AN ACCOMPLICE IN THE COMMISSION OF, OR AN ATTEMPT TO COMMIT ANY ROBBERY, SEXUAL BATTERY, ARSON, BURGLARY, KIDNAPPING, OR AIRCRAFT PIRACY OR THE UNLAWFUL THROWING, PLACING OR DISCHARGING OF A DESTRUCTIVE DEVICE OR BOMB. FLA STAT. 921.141(5)(d).

The State has proven beyond all reasonable doubt that when the Defendant murdered Bea Sabe Joseph, Sam Joseph and Genevieve Abraham, he was committing the offense of Armed

OFF REC BK
17526 PG 3212

Burglary With An Assault, as reflected by the Jury's verdict and the evidence presented at trial.

Mr. and Mrs. Joseph were murdered in their own home. The Defendant, acting in concert with the Co-Defendant, entered the Joseph's home, threatened them with a gun, and hit, punched, or knocked Mrs. Joseph in the mouth, splitting her lip and causing her to bleed substantially. While holding the Josephs at gunpoint, Mrs. Abraham, a very close and dear friend, arrived and was unwittingly dragged into the horror within a home she had visited often and had no reason to fear.

Virginia Nimmer, Mrs. Abraham's sister, testified that the Josephs were very security conscious and always kept their doors locked. Luis Rodriguez, the Co-Defendant in this case, testified that when the Defendant knocked at the Joseph's door and tried to get Mr. Joseph to open the door with a ruse, Mr. Joseph refused to open the door. When he could not get Mr. Joseph to voluntarily open the door, the Defendant forced his way in.

While inside the Joseph's home, the Defendant armed himself with a second gun found in the house which was subsequently used to shoot the victims.

The Josephs certainly had the right to feel safe and to be safe in their own home. Mrs. Abraham, who had visited the Josephs on numerous occasions, also had the right to feel safe in the Joseph's home. Based upon the evidence which supports this aggravator, this Court gives this aggravating circumstance great weight.

While the State also proved beyond a reasonable doubt that all three homicides were committed while the Defendant was also engaged in the commission of a robbery. In order to avoid the possibility of impermissible doubling with the aggravating circumstance that the capital felony was committed for pecuniary gain, Florida Statute 921.141(5)(f), this Court did not

OFF. REC. BK.
17526 PG 3213

consider nor weigh this robbery evidence, as to this aggravator and did not base its determination of the existence of this aggravating circumstance, upon this evidence.

THE CAPITAL FELONY WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY. FLA. STAT. 921.141(5)(e)

After a very careful review of the evidence and the case law, this Court hereby concludes that the evidence establishes beyond a reasonable doubt, the existence of this aggravating circumstance as to all three victims. The evidence varies somewhat as it relates to each victim and is somewhat stronger as to Bea Sabe Joseph and Genevieve Abraham as is reflected in the following factors considered by the Court.

The Defendant was the Josephs' tenant, living in the same apartment building as Sam and Bea Joseph. He had performed odd jobs for them both in their own personal apartment and in the building. The Defendant's step-son occasionally washed their car. The Defendant was well known to the Josephs.

The Defendant's initial plan was to stage a "kidnapping" of his family in order to convince the Josephs to give him money and valuables to rescue his family. The Defendant contacted the Co-Defendant, Luis Rodriguez, who lived in Orlando and who was unknown by the Josephs, and convinced him to come to Miami to assist him is this ruse. Had this plan simply failed and had the Josephs been killed during this attempt, even though they clearly knew the Defendant and could easily have identified him, this Court being mindful of the Florida Supreme Court's prior rulings, would not have found this evidence sufficient to establish the existence of this

OFF. REC. BK.
17526 PG 3214

aggravator. (Strong proof is required of the Defendant's motive to prove the existence of this aggravator, Riley v. State, 465 So. 2d 490 (Fla. 1984); The mere fact that the victim knew and could have identified his assailant is insufficient to prove intent to kill to avoid lawful arrest. Caruthers v. State, 465 So. 2d 496 (Fla. 1985)).

The following factors considered in addition to the already articulated factors, are what establish the existence of this aggravating circumstance. Of primary importance is the fact that prior to leaving his own apartment, the Defendant armed himself with not only a gun, but with two pairs of latex gloves. These gloves were not needed to carry out the ruse. When Mr. Joseph did not fall for the ruse and would not open his door, the Defendant pushed the door open and entered the apartment. After entering the apartment, the Defendant pushed Mr. Joseph up against the dining room table where Mrs. Joseph was sitting. After the Josephs were subdued, the Defendant took out the latex gloves, put on a pair, tossed the other pair to the Co-Defendant and ordered him to put them on and to go into the back room and to look for the money. The Defendant told the Co-Defendant not to touch anything without the gloves on.

This evidence clearly establishes the existence of a secondary plan which included the leaving behind of no evidence which could link the Defendant to these crimes. When Mrs. Abraham arrived during the search of the house for valuables, she too had to be eliminated.

Mr. and Mrs. Joseph clearly had to be eliminated as witnesses. They knew the Defendant, they knew where he lived, they knew his wife and his children, and more importantly, they knew his name. They not only could identify him for the Armed Robbery/Armed Burglary to their home, but this information could have had serious ramifications for the Defendant who was on parole for Armed Robbery under his own name with an open warrant in the system and who was

OFFICIAL RECORDS
17526 PG 3215

on probation for another Armed Robbery in his own name and a Grand Theft and Carrying a Concealed Firearm under the name of Antonio Chait. The Defendant certainly had reason to believe that if he were to be arrested for these offenses, he not only would be sent to prison, but would most likely receive a lengthy sentence and no parole.

The evidence establishes beyond a reasonable doubt that the Defendant's secondary plan included the leaving behind of no evidence to link him to these crimes. The Defendant brought two pairs of latex gloves so neither his nor the Co-Defendant's prints would be found in the apartment. He came armed with a firearm. He knew the Josephs were home and yet he did not try to hide his identity by either concealing himself or wearing a mask, because he did not intend to leave them alive. The Defendant, in fact, told his wife Maria Malikoff after the murders, that he had "made sure they were all dead".

An argument can be made that while the Defendant could not afford to leave any witnesses and that he intended to kill the Josephs if the kidnapping plan was not successful, that at the time the Defendant shot Mr. Joseph, he did so out of anger.

Luis Rodriguez, the Co-Defendant in this case, testified that after the Josephs were subdued, the Defendant told him to go into the bedroom to look for the money and valuables. Mr. Joseph had offered to go get everything for them, but the Defendant made him sit at the table and ordered Luis to search for these items. While Luis was searching the bedroom, he discovered a .38 caliber revolver in the nightstand and returned to the living room to notify the Defendant of what he had found. When the Defendant learned that Mr. Joseph had a loaded gun in his bedroom, he became enraged as he believed Mr. Joseph's motive for offering to get the money was to retrieve the gun. Had the Defendant killed Mr. Joseph at this point, it could be

OFF. REC. BK.
17526 PG 3216

argued that while the Defendant intended to kill the Josephs before leaving the apartment, that at the time he pulled the trigger, it was out of rage. The evidence, however, is that the Defendant, although very angry at Mr. Joseph, did not kill him at that point and in fact left the living room without harming him in any way.

While the Defendant was in the bedroom, Mrs. Abraham came to the door to visit the Josephs. She was forced into a chair near the door. When she realized what was taking place, she offered the Defendant and the Co-Defendant her jewelry and begged for them to take everything and to just leave. Mr. Joseph even encouraged Mrs. Abraham to cooperate.

While Mrs. Abraham was removing her jewelry, the Defendant fired a shot into Mr. Joseph's head and then shot at Mrs. Joseph. He then turned his gun on Luis Rodriguez and ordered him to "Off her!" "Off her!" "Do it!" (referring to Mrs. Abraham). Luis Rodriguez testified that he thought the Defendant was going to kill him, so he pulled the trigger, firing one shot into Mrs. Abraham's body, using the .38 caliber gun he had found in Mr. Joseph's nightstand. After shooting Mrs. Abraham, Luis Rodriguez testified that he threw the gun to the Defendant and fled the apartment. When he left, he testified that Mr. and Mrs. Joseph were still sitting at the table.

The evidence presented through the testimony of Mrs. Nimmer who found the bodies, James Casey who was in charge of the crime scene and who impounded the projectiles found on the scene, Detective Loveland who impounded the projectiles removed during the autopsy of Mrs. Abraham, Ray Freeman, the firearms expert, and Dr. Rao, who performed the autopsies, established that two firearms were used to commit these murders, the .22 caliber revolver the Defendant brought with him and the .38 caliber revolver which Dr. Rao testified belonged to Mr.

OFF. REC. BK.
17526 PG 3217

Joseph. At least seven (7) shots were fired. Only three (3) shots were fired while the Co-Defendant Luis Rodriguez was in the apartment. Luis fired one shot at Mrs. Abraham with the .38 which was a close contact wound to her left temple and which may not have been fatal as it did not penetrate her brain, and then fled the apartment.

Mr. Joseph received four gunshot wounds, three of which were inflicted after Luis fled the apartment. All were inflicted by the Defendant. One penetrated his left shoulder from the back and exited the front of his shoulder. Another shot was a through-and-through wound to his hand which Dr. Rao testified could have occurred from a shot fired at a different victim. A spent projectile was found lying on the dining room table where Mr. Joseph was seated. Two more gunshot wounds were inflicted at close range (stippling was present) and were to Mr. Joseph's face. Both were fatal. One projectile was recovered from Mr. Joseph's skull and one was found on the carpeting when it dropped from where it had been trapped in Mr. Joseph's clothing. Mr. Joseph had only been shot once or perhaps a second time when the Defendant shot at Mrs. Joseph while he was sitting at the table. The two shots to the face were inflicted while Mr. Joseph was on the floor at point blank range, execution style, with the .22 caliber revolver.

Bea Joseph received a graze wound to the back of her neck and then shot in the forehead, causing tremendous injury. This was a fatal shot

Mrs. Abraham, as previously discussed, was shot once by Luis Rodriguez to the left temple, using the .38 revolver. This was a close contact wound but not necessarily fatal. She was also shot by the Defendant using his .22 revolver at a distance of over eighteen (18) inches away. The projectile traveled from behind her ear, into her neck, fracturing the spine of her neck and continuing down her back. This was a fatal injury as the projectile nearly severed her spinal

OFF REC BK
17526 PG 3218

chord.

The positioning of the bodies, the testimony of Luis Rodriguez, the caliber of gun showing which firearm was used to shoot each individual victim and the type and location of each wound and the testimony of Maria Malikoff who the Defendant told he "made sure they were all dead" supports a finding that after the Defendant shot Mr. Joseph and fired at Mrs. Joseph and Luis shot Mrs. Abraham, the Defendant shot each victim at least once (and in the case of Mr. Joseph, two (2) more times) in the face or head to insure their deaths.

While an argument can be made that the initial shot fired at Mr. Joseph was out of anger, the two shots execution style to his face were clearly to eliminate him as a witness. Once he had shot Mr. Joseph, he knew he must also eliminate Mrs. Joseph as a witness. Having shot both Mr. and Mrs. Joseph, he decided that Mrs. Abraham must also die. By eliminating Mrs. Abraham as a witness and by forcing Luis Rodriguez to shoot her, he believed he had also eliminated the possibility that Luis himself would become a witness. By involving Luis in the murders himself, he believed he had forced him into silence and had eliminated him as a witness as well.

It should also be noted that all three victims were elderly. All were cooperative and sitting when they were murdered. None of the victims posed a threat to the Defendant nor impeded his ability to commit the robbery. The only threats they each posed was to his arrest and subsequent identification in this robbery and the violation of his parole and probation for various other crimes.

Based upon the totality of the evidence, this Court finds beyond a reasonable doubt the existence of this aggravating circumstance as to each victim and as such assigns it great weight.

OFF.REC.BK
17526 PG 3219

THE CAPITAL FELONY WAS COMMITTED FOR PECUNIARY GAIN. FLORIDA STATUTE 921.141(5)(f)

The evidence presented at trial establishes beyond a reasonable doubt that the victims were murdered to facilitate the theft. The Defendant had targeted the Josephs because he was aware of the money they kept in the house. He was also aware of Mr. Joseph's coin collection and other valuables kept in the house which he believed was worth over $50,000. All three victims were robbed of their jewelry and money, and other money, jewelry and valuables were also taken. As this Court has previously found that the capital felonies were committed in the course of an Armed Burglary and specifically did not consider the robbery which also took place during the commission of these capital felonies, when considering that aggravating circumstance, there is no "doubling" of factors. The fact that these capital felonies were motivated by pecuniary gain does not refer to the same aspect of the Defendant's crime considered in 921.141 (5)(d), and therefore does not "merge" into one factor. Armstrong v. State, 399 So. 2d 953 (Fla. 1981); Bates v. State, 465 So. 2d 490, 492 (Fla. 1985); Melton v. State, 19 FLW S262 (Fla. 1994).

As pecuniary gain was the motivating factor which set the entire chain of events into motion, this Court assigns great weight to this aggravating circumstance.

THE CAPITAL FELONY WAS A HOMICIDE AND WAS COMMITTED IN A COLD, CALCULATED AND PRE-MEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION. FLA STAT. 921.141(5)(i)

[DIFFERENCE]
17526PG3220

The State has proven beyond a reasonable doubt that the murders of Sam Joseph, Bea Sabe Joseph, and Genevieve Abraham were committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

The requisite heightened premeditation existed. The Defendant called the Co-Defendant, Luis Rodriguez who was living in Orlando, at least one week prior to the murders, to illicit his assistance. The Defendant not only devised a plan to commit robbery, but also formulated a back-up plan should the initial plan fail. The back-up plan, of necessity, included the murder of Mr. and Mrs. Joseph as the Defendant knew if the initial ruse failed, he would have to force his way inside the Joseph's apartment to rob them. This would require eliminating Mr. and Mrs. Joseph as witnesses because they knew him and he lived in their building as their tenant. When the Defendant left his apartment with the Co-Defendant, the Defendant armed himself with a loaded handgun and two pairs of latex gloves, realizing that if the ruse failed and he had to force his way in and rob the victims, he would have to kill them and search the apartment for their valuables and he did not want to leave behind any prints.

The Defendant shot Sam Joseph four times. Two of these shots were directly to Mr. Joseph's face, at very close range, execution style. The Defendant shot Bea Sabe Joseph, at least once, but almost certainly two times and again one shot was a head shot to her forehead inflicting tremendous and mortal injury. While shooting Mr. and Mrs. Joseph, the Defendant turned his gun towards the Co-Defendant who was standing behind Genevieve Abraham and ordered him to kill her, yelling "Off her! Off Her! Do it!" After the Co-Defendant shot Mrs. Abraham once in the head, also execution-style, the Co-Defendant threw the gun he had used, to the Defendant and fled the apartment. The evidence presented established that after the Co-Defendant fled, the

OFF REC BK
17526 PG 3221

Defendant fired at least one shot into each of the bodies to insure their deaths. At the time of these shots, the victims may have been alive, may have been in the process of dying, or may have already been dead. The relevance of these shots is to show the cold and calculated deliberation demonstrated by the Defendant, who wanted to make certain each victim would die. This conclusion was further supported by the Defendant's statement to his wife Maria Malikoff that he made certain they were dead.

No evidence or argument was presented that the murders were committed with a pretense of moral or legal justification. The motive was robbery. The motive was greed in its simplest terms. The Defendant coveted what the Josephs worked hard to obtain. The Defendant was going to try to take these items without violence, but if violence was necessary, then so be it. He came prepared. None of these elderly people offered any resistance. In fact, they tried to cooperate and begged the Defendant to take the property and leave without harming them. Each was shot while seated and fully compliant with the Defendant's demands.

All three murders were committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. Based upon the evidence presented, this Court gave this aggravating circumstance great weight.

The remaining aggravating circumstances enumerated in the Statute were not argued by the State nor proven by the evidence and therefore not considered by this Court.

STATUTORY MITIGATING CIRCUMSTANCES

THE CRIME WAS COMMITTED WHILE THE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL AND EMOTIONAL

OFF REC BK
17526 PG 3222

DISTURBANCE. FLA. STAT. 921.141(6)(b).

A great deal of evidence was presented regarding this mitigating circumstance.

Two of the Defendant's sisters testified during the penalty phase presentation of the evidence. Mayra Molinet, the Defendant's younger sister, testified that she, her mother and the Defendant came to Florida from Cuba in February of 1966. Mayra was six (6) years old at the time and the Defendant was nine (9). Their older sister, Ana was already here living with her husband. A third sister, Francis also lived in Miami. Ms. Molinet testified that their mother was a hard working woman who worked every day to support her family and who loved her children. At some point Francis began using heroin. When their mother discovered that her daughter was using drugs, she became very depressed and eventually had a nervous breakdown. Ms. Molinet testified that the Defendant would get depressed when he saw his mother in this condition.

Despite the pain and depression Francis's drug use caused the Defendant's mother and the Defendant's sadness over his mother's pain, the Defendant added to the pressures his mother faced by "hanging around with the wrong type of people" and began getting into trouble. (testimony of the Defendant's sister Ana Fernandez). He also apparently moved out of his mother's home and at age eighteen (18) or nineteen (19) in late 1975 he also began using heroin and cocaine with his sisters Francis and Myra.

It was shortly after the Defendant's involvement with drugs that his criminal conduct escalated from stealing cars to committing armed robberies. The Defendant's arrests, in turn, exacerbated the Defendant's mother's depression and she tried to take her own life.

When the Defendant was arrested in 1977 for these two armed robberies, the Defendant

OFF REC BK
17526 PG 3223

was evaluated by Dr. Rosalind Pass a psychologist who saw the Defendant only once on July 21, 1977, and concluded that the Defendant was suffering from schizophrenia, was delusional, and had both a thought and behavioral disorder. She also concluded that the Defendant was incompetent to proceed and recommended psychiatric treatment. Dr. Pass based her findings in part on the Defendant's report to her that he heard sounds and saw people who were not there. The Defendant had also claimed to have no memory of the crimes he committed. While the Defendant admitted to using LSD every day for three to four years and to using heroin, and there was no reports or indication that the Defendant had demonstrated any signs of suffering from any mental illness prior to his arrest in 1977, Dr. Pass, who found no brain damage and no retardation, concluded that the Defendant's reported delusions and memory loss was due to schizophrenia as opposed to long-term drug use of hallucinogenic drugs like LSD. As Dr. Pass only spoke to the Defendant that one time in 1977, she could not and did not render any opinions on the Defendant mental state in December of 1984 when he committed these homicides.

Based upon Dr. Pass's recommendation, the Defendant was sent to a mental facility for treatment. Shortly after the Defendant was admitted, he was seen by Dr. Charles Mutter, a forensic psychiatrist, on August 11, 1977. Dr. Mutter concluded that the Defendant was suffering from drug psychosis, which is certainly consistent with the lack of prior manifestations of a mental disorder and the Defendant's reported two to three year hallucinogenic drug use. Dr. Mutter did see some signs of a possible mental illness and stated that while schizophrenia could not be ruled out, the Defendant had also demonstrated signs of malingering so he also could not rule out the possibility that he was simply "faking it". As will be discussed shortly, Dr. Mutter evaluated the Defendant again in 1980 and found that the Defendant was malingering to avoid

[OFFICIAL RECORD]
17526PG3224

going to trial. At that time, he revised his earlier opinion (the 1977 possible mental illness) and determined that the Defendant was acting sicker than he was in an effort to consciously deceive and to avoid his legal difficulties.

The Defendant called Mirka Dessel-Jaffe, the Defendant's cousin during the penalty phase. She testified that she was called and asked to visit the Defendant while he was being treated at the hospital in 1977 or 1978. This was the only time she had visited him in the hospital and she did not see him again until 1984 when his daughter died and then not again until her testimony on the stand. When she saw the Defendant in the hospital, he was completely incapacitated and had to be carried into the room by the staff. The Defendant could not walk, talk, or control his movements. Ms. Dessel-Jaffe believed the Defendant had been over medicated. She registered a complaint with the staff and through her mother's assistance and a Court Order, they were able to have the Defendant taken to a hospital for an evaluation and a review of the medication he was receiving. Ana Fernandez, the Defendant's sister who testified that she had visited the Defendant nearly every week during his stay at South Florida Mental Hospital, also remembered that one brief episode witnessed by the Defendant's cousin in 1977 or 1978. She also opined that the Defendant's condition may have been caused by improper or over-medicating of the Defendant.

What these witnesses did not say, is as important as what they did say. What neither witness said, was that at any time prior to or after that one episode of what appears to have been a reaction to the medication the Defendant was receiving, had they observed any behavior by the Defendant which would even suggest the possibility that he was suffering from a major mental illness. Ana Fernandez grew up with the Defendant. She lived with him after he left home and

[OFFICIAL RECORDS]
17526 PG 3225

just prior to his arrest in 1977. She visited him every week in the hospital from 1977-1978, and yet the only testimony she offered regarding the Defendant's mental health was in reference to this one episode during his hospitalization, four years before the murders of Mr. and Mrs. Joseph and Mrs. Abraham and under circumstances strongly suggesting a drug over-dose. Ms. Dessel-Jaffe actually saw the Defendant in 1984 when his daughter died, and yet did not testify that the Defendant was behaving in any abnormal manner. Ana Fernandez testified that she also saw the Defendant in 1984 when he came to visit her. Her testimony is void of any reference to the Defendant's mental state or behavior during that visit, a time-frame which is certainly more relevant to a determination of the Defendant's mental state at the time of the murders.

In 1980, the Defendant, who still had not been made to face the pending criminal charges stemming from the two 1977 armed robberies, was evaluated by Dr. Paul Jarrett and re-evaluated by Dr. Mutter. These two evaluations will be discussed together as they were conducted less than one (1) week apart.

Dr. Paul Jarrett is a psychiatrist and served as the Chief of Psychiatry at Mercy Hospital for a four (4) year period. Dr. Jarrett examined the Defendant on November 14, 1980. After he had been returned from the hospital, to determine his competency to proceed to trial. Dr. Jarrett's findings were, however, somewhat contradictory as he found the Defendant to be "grossly disturbed in what appears to be a phase of schizophrenic psychosis" while finding that the Defendant was consciously posturing defensively (malingering) due to the legal troubles he was in. Dr. Jarrett admitted that he could not elicit enough data from the Defendant to formulate a reliable determination of his present or past mental state, and therefore recommended treatment until these determinations could be made. Dr. Jarrett did note, however, that it was the

OFF. REC. BK.
17526 PG 3226

Defendant, not he, who controlled the interview, and that the Defendant was irritable and that he was consciously distorting the truth. For example, the Defendant gave him several different and false places and dates of birth. He told the Doctor that he was studying math at the University of Miami (when he was being housed in the Dade County Jail) and he consciously lied about his own height. While Dr. Jarrett found that the Defendant was making up and distorting things to appear as though he had a mental disorder, that he was elaborating, feigning and malingering and most probably had a personality disorder, he concluded that the Defendant "probably" also had a mental illness as well.

Dr. Mutter, who saw the Defendant six (6) days later on November 20, 1980, also found the Defendant to be malingering but concluded that the Defendant was suffering from schizophrenia and recommended hospitalization. As was noted earlier, Dr. mutter retracted this conclusion after reviewing the reports of other doctors, the Defendant's medical records, and after reviewing other facts concerning the crimes the Defendant committed and the level of planning and sophistication used by the Defendant. Dr. Mutter's current diagnosis is that the Defendant suffers from no major mental illness and is not schizophrenic. The Defendant, instead, he believes, has an anti-social personality disorder, which is a character disorder wherein the person lacks a conscience, feels no guilt and is not loyal to anyone. Dr. Mutter concluded that the Defendant knew and knows what he is doing, but doesn't care and blames others for his conduct. Dr. Mutter found the Defendant's conduct inconsistent with the mental defect claimed. He also concluded that if the Defendant was capable and able to provide Detectives with a detailed account of his crimes, after his ararest, that his claimed amnesia when interviewed by doctors to determine his competency for trial, was simply a lie.

OFFICIAL RECORDS
17526 PG 3227

The testimony and evidence concerning the Defendant's mental state or mental health, then abruptly skips to 1989 after the Defendant was arrested and charged with over sixty (60) violent felony crimes committed during a one year period from February 1988 through January, 1989. There was no evidence presented to suggest that when the Defendant was arrested and convicted in 1982 and in 1985 that he demonstrated any symptoms associated with a mental illness or that he needed any mental health treatment. These two periods of time are certainly more relevant to the Defendant's mental state in December of 1984, than the evidence of the Defendant's mental state in 1989.

Three of the doctors who were called to testify, saw the Defendant after his arrest on January 19, 1989. Dr. Leonard Haber and Dr. David Rothenberg, saw the Defendant on February of 1989 and February 21, 1989, respectively.

On February 8, 1989, approximately three (3) weeks after the Defendant had given detailed accounts of his criminal conduct to Detective Starkey, the Defendant told Dr. Haber and Dr. Rothenberg that he could not remember anything at all about his charges.

Dr. Rothenberg testified that while the Defendant was able to give the police addresses of the establishments he had robbed and facts concerning how he had carried out these robberies, it was not unusual that he was unable to do so three (3) weeks later. Dr. Haber emphatically disagreed with Dr. Rothenberg and testified that there is no medical explanation for this "amnesia" unless the Defendant had hit his head at the time of his arrest and developed amnesia, a possibility which he ruled out, as the Defendant was able to recall these details after his arrest. Dr. Haber also noted that the Defendant's "amnesia" appeared to be selective as the Defendant had no difficulty remembering addresses where he had lived and schools he had attended. Dr.

OFFICIAL RECORDS
17526 PG 3228

Haber concluded that the Defendant was simply lying.

Dr. Rothenberg reported that his initial interview and evaluation of the Defendant was brief due to the Defendant's complaints and his observations. The Defendant had a noticeable tremor in one hand, was perspiring and was red in the face. He complained of seizures. Dr. Rothenberg concluded based upon this brief evaluation, and without reviewing reports regarding the crimes committed by the Defendant, the level of sophistication, the Defendant's demeanor during the crimes and when he was interviewed by the police, and even without speaking to any of the Defendant's family members about the Defendant's mental history or behavior during his one (1) year crime spree, concluded that the Defendant was incompetent to proceed to trial and insane when he committed these crimes.

One year later, Dr. Rothenberg and Dr. Haber re-evaluated the Defendant and both concluded that the Defendant was incompetent to proceed. Dr. Rothenberg testified that when he saw the Defendant on March 21, 1990, it was impossible to test the Defendant as he was in a stuporous state. He noted that the Defendant was taking Trilafon which is prescribed for psychotic disorders and Cogentin which is given to treat the side effects associated with the taking of Trilafon. Dr. Rothenberg testified that while Trilafon is prescribed to treat psychotic disorders, that it is also used to "quiet" patients or to "control" prisoners. It must also be noted that Dr. Haber testified that Trilafon can cause tremors. Dr. Haber saw the Defendant one week later on March 29, 1990, and concluded that the Defendant was incompetent basically because the Defendant continued to claim no memory of the charges he was facing and was continuing to report visual and auditory hallucinations. Dr. Haber testified that the Defendant's claimed lack of memory significantly impacted on his determination. It must be noted that Dr. Haber, after

OFFICIAL RECORD

17526PG3229

learning of the Defendant's confessions which included facts and details about the crimes made to the police after his arrest, concluded that the Defendant was lying about his memory loss. This conclusion obviously is significant as this "memory loss" was the dominant factor motivating Dr. Haber's finding that the Defendant was incompetent.

The evaluations conducted by these two doctors six (6) months later, revealed no change in the Defendant who was still reporting hallucinations and claiming not to remember the crimes he had committed. The only thing remarkable about these interviews is that the Defendant also claimed that he did not now remember his date of birth and the Defendant specifically requested to go back to the hospital.

When interviewed by Dr. Rothenberg over this two (2) year period, the Defendant made several statements regarding his use of drugs prior to his arrest. On March 21, 1990, while the Defendant was still professing not to remember anything about the crimes, he told Dr. Rothenberg he was using crack cocaine for one week before the crime (the Defendant apparently was referring to the last crime he committed on January 19, 1989) and that he needed more cocaine and that's why he committed the crime. On another occasion he claimed he was taking sixty (60) Tylenol 3 (with codeine) tablets a day! On yet another occasion, he told Dr. Rothenberg he was using LSD once a week. The Defendant's reported drug use is however, inconsistent with his conduct during the commission of the crimes and the Defendant's demeanor and appearance upon his arrest, and his ability to talk coherently, process information, and to remember details of crimes committed months prior to his arrest. This reported drug use is also inconsistent with logic and while there is no doubt that the Defendant abused drugs, as with much of what the Defendant reports, his drug usage appears to have been exaggerated by the

OFF:REC:BK
17526PG3230

Defendant.

After Dr. Rothenberg and Dr. Haber's initial interviews with the Defendant in February of 1989, the Defendant was sent to South Florida Evaluation and Treatment Center. Dr. Joan Tarpin, the clinical psychologist whose floor the Defendant was assigned to, testified that the Defendant had been taking Prolixin Decanoate, Dilantin, and Phenobarbital while in jail and that upon his admission to her facility, these medications were continued. She explained that Prolixin is generally administered for thought disorders and that the other two medications are prescribed for seizure disorders. Dr. Tarpin testified that Prolixin is generally prescribed to those who are having "unrealistic thinking", who claim to be hearing voices, or who are delusional. Prolixin, therefore, is used to treat major mental illnesses.

Upon the Defendant's admission, he was given and EEG and a CAT scan. These tests ruled out the possibility of any brain damage or brain dysfunction. The Defendant was also clinically evaluated. Based upon the Defendant's reported hallucinations and other claims, their original diagnosis was that the Defendant was possibly suffering from a substance abuse disorder or was possibly suffering from a schizophrenic disorder. During his stay, the staff observed the Defendant carry on normal conversations with people and appeared to be quite aware of what was going on around him. The question of malingering was raised on several occasions, but was never answered. Dr. Tarpin testified that the Defendant was clearly anxious about going to trial on the pending charges, and that he appeared to be unmotivated to help himself or to return to Court.

While the initial diagnosis was that the Defendant was possibly suffering from a substance abuse disorder or schizophrenic disorder, their final diagnosis was that the Defendant was actually

[OFFICIAL RECORD]
17526 PG 3231

suffering from substance abuse hallucinations. She also testified that the Prolixin the Defendant was taking is for the treatment of a major mental illness and was the wrong medication to treat drug-induced hallucinations. This medication, she testified, would therefore sedate the Defendant and "slow him down a few levels". This testimony is important as when Dr. Rothenberg saw the Defendant on March 21, 1990, he could not even evaluate the Defendant because of his stuporous state. Dr. Rothenberg testified that at that time the Defendant was taking Trilafon which is also prescribed for psychotic disorders and can actually produce tremors and is not the correct medication to treat substance abuse problems.

Dr. Gerard Garcia treated the Defendant at this same facility from March 1990, through September, 1991. According to Dr. Tarpin, the Defendant had been returned to the Dade County Jail after it had been determined that he was competent to stand trial. Based upon the Defendant's claimed inability to recall the events in question, the Court again found the Defendant to be incompetent to proceed and returned him to the hospital for continued treatment. The diagnosis upon his admission was that the Defendant was suffering from schizophrenia undifferential type and/or was possibly malingering.

After a brief stay (approximately six months), the Defendant was again found to be competent to proceed and returned to Court.

Dr. Garcia testified, that he believed the Defendant was not malingering and that he had observed the Defendant when he was experiencing some kind of a hallucination. Dr. Garcia testified that schizophrenia is a permanent condition which can go into remission if controlled with medication. Since Dr. Garcia's first contact with the Defendant was in March of 1991, he could not of course, testify as to the Defendant's mental state or mental health in 1984 when the

OFF REC BK
17526 PG 3232

Defendant committed these homicides. It should also be noted that Dr. Tarpin testified that in 1990 the Defendant was not schizophrenic.

As the testimony of the witnesses varies substantially and is so contradictory, the issue of the Defendant's mental health remains questionable. If the Defendant is suffering from a mental illness at present and that determination is in dispute, the question still remains as to whether or not the Defendant was suffering from a major mental illness in 1984 and whether at the time of these murders, he was "under the influence of extreme mental and emotional disturbance" as is required to establish this statutory mitigating circumstance.

To make that determination, this Court looked to the actions of the Defendant at the time just prior to and during the commission of these crimes, as well as the medical testimony.

None of the people who had seen the Defendant or who interacted with the Defendant during that time frame, testified that the Defendant was behaving irrationally or abnormally. The Josephs hired the Defendant to do odd jobs for them and actually allowed the Defendant to do work inside their own apartment. The Defendant's family sent this Court a letter on January 15, 1997. It was signed by the Defendant's mother, his two sisters, and his Aunt and Uncle. His family writes that the Defendant has always been caring and sensitive and that when he worked in the family business (which was during the time frame in which these murders were committed), he was reliable, responsible, dedicated and sincere in his duties, and that he always treated the customers with great patience and care.

The Defendant's friends have also written to this Court. What is interesting about all of these letters from friends and relatives, is they are devoid of any mention of mental illness. Ms. Alvia Palmer-Michel who appears is a very close friend and cares deeply about the Defendant,

OFFICIAL RECORD
17526 PG 3233

writes that while the Defendant has some "character flaws", she remarks that we all possess these character flaws.... Ms. Palmer Michel explained the Defendant's 1988-1989 violent crime spree, not as a result of a mental illness or the failure of the Defendant to take medication, but as the Defendant's irresponsible reaction to his financial strains. She claims the Defendant "lashed out at society and released his frustration, unabashedly violent behavior on unsuspecting hardworking tax payers" because he blamed his pressures on society. She called this behavior "criminal and cowardly".

These letters do not claim that the Defendant was sick or "disturbed". They claim, instead, that the Defendant did not receive a fair trial, that the witnesses lied, that the prosecutors were evil, and that the Defendant could not have committed these crimes.

The evidence presented during the guilt phase reflect a man who carefully planned these crimes. He formulated a plan involving a ruse to trick the Josephs into handing over their money and valuables. He called the Co-Defendant and elicited his help. He armed himself with a loaded gun and two pairs of latex gloves in the event that plan "A" would fail and plan "B" would have to be used. While the Defendant had clearly formulated an alternate plan, he was careful not to reveal this second plan to the Co-Defendant, Luis. During the burglary-robbery, the Defendant demonstrated rational behavior. The Josephs were subdued and guarded while the Co-Defendant was sent to search for the property. The Defendant put on a pair of the latex gloves he had brought with him in the event plan "B" had to be used. He gave the second pair to Luis and told him to put them on and not to touch anything without the gloves on. The shades were pulled down to avoid being seen by a casual observer. When Mrs. Abraham knocked on the door, he decided to let her in rather than chancing her alerting someone that something was

OFF. REC. BK.
17526 PG 3234

amiss inside the apartment. When the Defendant killed the Josephs, he ordered the Co-Defendant to shoot Mrs. Abraham. Not only would this eliminate her as a witness, but the Defendant cleverly made a murderer out of Luis Rodriguez, thereby insuring his silence. When Luis freaked and ran, the Defendant stayed behind and shot each victim again to make sure they each were dead. He then searched for other valuables, concealed them under his shirt and left the apartment. After committing these terrible crimes, the Defendant had the presence of mind to drive to the causeway to throw the guns into the water, thereby discarding the evidence which could link him to these murders.

These actions demonstrate deliberation and planning. These actions demonstrate clear thinking and the ability to react to unanticipated events, quickly, calmly and rationally. As Dr. Mutter testified, these are not the actions of or the disorganized behavior of a person who is suffering from schizophrenia.

Based upon a careful consideration of all of the evidence, this Court finds that when the Defendant was arrested in 1977, he was suffering from a substance abuse disorder based upon the Defendant's long-term and extensive use of heroin and LSD. This Court also concludes that when the Defendant learned that he could stay at a hospital and avoid going to Court and to prison for his criminal behavior if he was "sick", he consciously exaggerated his symptoms, manipulated the doctors and the system and became a malingerer.

In 1982, after the Defendant had absconded from supervision and was arrested for a new law violation, he demonstrated rational behavior and the ability to think quickly and rationally. He gave a false name and false date-of-birth to the police so they would not link him to the Manual Rodriguez who had absconded from supervision. When he was offered probation, he

OFF REC BK
17526PG3235

took the plea. The Defendant's competency did not become an issue because the Defendant did not need to rely on a mental illness claim to escape going to prison.

In 1985, when the Defendant was re-arrested, he provided yet another name and date-of-birth but was not as lucky as in 1982, because his true identity was discovered. He therefore, called Homicide and offered them "information" about these murders in exchange for a "deal". When Homicide would not give him any deals the Defendant pled guilty to the charges and went to prison. There was no evidence introduced to suggest that the Defendant was suffering from a mental illness at that time.

When the Defendant was arrested in 1989 and charged with over sixty (60) felony offenses, the Defendant knew the consequences would be severe. It would appear that this knowledge is what triggered the Defendant's reported symptoms of illness and a three-year stay at hospitals where the Defendant, because of his prior history and his reported symptoms, was given psychotropic medications. Some of the Doctors now agree, these medications were improperly administered as the Defendant was not suffering from a major mental illness, but was suffering instead from substance abuse disorders and was for the most part "faking it". One can only imagine the damage long-term drug abuse followed by doses of anti-psychotic medication, can do to a person who was not mentally ill...

Based upon the totality of the evidence presented, this Court concludes that the evidence does not establish that the Defendant was under the influence of extreme mental or emotional disturbance at the time he committed the murders of Sam Joseph, Bea Sabe Joseph and Genevieve Abraham, and as such gave this statutory mitigating circumstance, no weight.

OFFICIAL RECORD
17526PG3236

THE DEFENDANT WAS AN ACCOMPLICE IN THE CAPITAL FELONY COMMITTED BY ANOTHER PERSON AND HIS PARTICIPATION WAS RELATIVELY MINOR. FLA. STAT. 921.141(6)(d)

The Defendant claims that he was a mere accomplice to these homicides and that he never entered the Josephs' apartment, nor fired any shots. The only evidence to support this claim is the statement the Defendant gave to the Detectives after his arrest on August 13, 1993, nearly nine years after these murders were committed. This statement was, however, the Defendant's ninth version of the events and was not only not supported by the evidence, it was refuted by substantial competent evidence.

The Defendant's first version was in July of 1985, seven months after the murders, when the Defendant contacted Metro-Dade Police Department's Homicide Bureau, claiming he was Antonio Chait and that he had seen two men running from the Josephs' apartment on the day of the murders. He identified one of the men as Juanito. Homicide's investigation, however, revealed that the Defendant's name was not Antonio Chait, it was Manuel Rodriguez, and that Juanito was not involved in these Homicides.

Four months later on November 25, 1985, the Defendant called them again. This time he identified himself as Antonio Travis, who we later learned during the sentencing phase, was incarcerated in the Dade County Jail on robbery charges, and parole and probation violations. Detective William Venturi testified that when he confronted the Defendant and told him they knew he was in fact Manuel Rodriguez and that he had lied to them several months earlier, the Defendant admitted to giving them false information and asked the Detective if he could assist him with his pending charges if he gave them information about these murders. The Defendant

OFF. REC. BK.
17526 PG 3237

then told Detective Venturi that he saw Giraldo leaving the Josephs' apartment and that he had lied at first because Giraldo is violent. This second version given by the Defendant also proved to be false.

On November 29, 1985, the Defendant was confronted with the fact that the information he had given to them had been investigated and found to have been false. The Defendant was read his rights and Detective Venturi told the Defendant they believed he was involved in these homicides and asked him if he was ready to tell them the truth about his involvement. The Defendant told the officers that the Josephs were "stingy" and then put his head down and began to cry. No further statements were taken at that time.

On August 13, 1993, after the Defendant was arrested and charged with the murders of Sam Joseph, Bea Sabe Joseph and Genevieve Abraham, he was advised of his rights and interviewed. It was during this interview that versions 3, 4, 5, 6, 7, and 8 were offered by the Defendant. At first the Defendant claimed Luis was not in town that day and that the Defendant did not know anything about the homicides because he was in Homestead stealing fruit. Next, the Defendant claimed that they had set off some insecticide bombs in the apartment, so he drove to Homestead. The Defendant stated during this version that he had no idea where Cookie (his common law wife) and his children were at the time. In the Defendant's fifth version he changed the facts only slightly, stating that he had set off the bombs after returning from Homestead and because of the smell he took Cookie and the kids to his mother's house, where they all remained all evening. In version number six, the Defendant claimed that after they left the apartment, they had gone to Miami Children's Hospital because their daughter was having adverse reactions to the insecticide spray. These versions conflict with Cookie's statement during the sentencing

OFF REC BK
17526 PG 3238

phase where she claimed that they had all gone to Enchanted Forest that evening.

The Defendant's seventh (7th) version took a completely different track. The Defendant claimed that there was a large conspiracy involving the apartment building. He claimed that the new owners were doctors and that these doctors were involved in this murder conspiracy.

When the Defendant was finally confronted and told that Cookie and Luis had given them a complete statement, the Defendant provided them with version number eight (8), telling the Detectives that Cookie's family didn't like him and would lie about him. In this version, the Defendant claimed that Luis had come from Orlando to visit Cookie. While at the apartment, he told them Luis needed the Defendant's assistance to obtain some money. The Defendant stated that he told Luis that he knew his landlord would have money in the apartment, but that he couldn't be involved because they knew him. Luis asked him to just help him get inside. Luis made a call and then they went to the Joseph's apartment. As they were walking to the apartment, the Defendant claims Isidoro (Luis's brother who also lives in Orlando) arrived. The Defendant knocked at the Josephs' door. The Defendant stated that when Mr. Joseph opened the door, Luis and Isidoro pushed their way in. The Defendant stated that he remained outside and after a few moments he heard gunshots. Luis and Isidoro ran out and Isidoro left. He and Luis went upstairs, got Cookie and the kids and left. They drove to a canal and Luis threw the guns in the water.

This final version of the events, given by the Defendant lacks any credibility. This was the Defendant's ninth (9th) version, after he had already lied eighty (8) times to the police. This statement was given by a convicted felon, a felon convicted of over seventy (70) felonies involving violence and a felon looking at the possibility of the death penalty. This statement was

OFF REC BK
17526 PG 3239

also refuted by substantial competent evidence, including the statement given by Luis to the police upon his arrest in 1993, Luis's testimony at trial, and the statement given by Cookie to the police wherein she told the Detectives that the Defendant had admitted to the killings and that he had told her that before he left he made sure they were dead. The Defendant's statement was also refuted by the testimony of Rafael Lopez who testified that shortly after the murders in late 1984 or early 1985, after Luis had been drinking, Luis had told him that he and Tony (which is what the Defendant was called) committed these murders. Alicia Rodriguez (Luis and Cookie's mother) testified that after she read about the homicides, she found a bag with jewelry and coins under her trailer which she removed and hid. The next day she looked outside and saw the Defendant and Cookie looking under the trailer for the bag. When she went outside they asked her about the bag, but she claimed she had not seen it. The Defendant's statement was also refuted by Isidoro's testimony at trial that he was not involved in these murders and the documents he provided which proved that he was in Orlando on the day of the homicides, not in Miami.

In contrast to the Defendant's final version of the events, which conflicts with the evidence presented at trial, was the testimony given by the Co-Defendant Luis Rodriguez. Luis testified that it was the Defendant who planned these crimes and targeted the Josephs, the Defendant who elicited his assistance, the Defendant who provided the gun, the Defendant who provided gloves so they would leave no prints, the Defendant who pushed the apartment door open when Mr. joseph did not fall for the ruse, the Defendant who shot Mr. and Mrs. Joseph and the Defendant who ordered him to shoot Mrs. Abraham.

While it can be argued that Luis had a motive to lie when he testified to these facts at

OFF. REC. BK.
17526 PG 3240

trial, it must be noted that his trial testimony was largely consistent with the statement he gave to the police three years earlier when his only motive to lie would have been to protect himself. Instead of protecting himself, he admitted with no prompting to having committed murder. His testimony was also consistent with the physical evidence and the testimony of the other witnesses.

After carefully considering and weighing all of the evidence, this Court finds that the evidence does not establish that the Defendant's role was a relatively minor one. To the contrary, the evidence supports a finding that the Defendant was the person who planned and carried out these three homicides, that he personally shot and killed Mr. and Mrs. Joseph, that he ordered the execution of Mrs. Abraham and that he may have even fired the shot which actually caused Mrs. Abraham's death.

As the Defendant's role was not a minor one, this aggravating circumstance has not been proven by the evidence and was therefore given no weight.

THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED. FLA. STAT. 921.141(6)(f)

As previously addressed in this Order, this Court has found that at the time of the commission of these homicides the Defendant was not under the influence of extreme mental and emotional disturbance and in fact demonstrated both rational thought and deliberate action.

The evidence overwhelmingly establishes the Defendant's awareness and concern for the criminality of his conduct. The Defendant planned the crimes well in advance. He knew that

OFF REC BK
17526 PG 3241

in order to succeed he would need the assistance of another person unknown to the Josephs, so he contacted his brother-in-law who lived in Orlando and with promises of substantial reward, was able to convince Luis to help him. The Defendant also formulated a back-up plan in case his original plan failed. This back-up plan, the Defendant realized, would require the murder of the Josephs because they knew him and would immediately report the incident to the police. The evidence actually suggests that the Defendant knew that the ruse would fail and that he was only using the ruse in order to convince Luis to help him.

Realizing that in all probability, he was going to have to kill the Josephs, the Defendant armed himself with a loaded gun and two pairs of latex gloves so that he would leave behind no witnesses to identify him and no prints to connect him to the murders. The Defendant had clearly realized that if the ruse failed, even if he did not take the matter any further, the Josephs would surely report the matter, the police would investigate, they would be told the Defendant's name and they may discover that he had absconded from parole and wasn't reporting to probation. These violations would have resulted in his return to prison. Therefore, the Defendant knew he would have to kill the Josephs and was clearly prepared to do so.

When Mrs. Abraham came to the door, the Defendant realized that she too must die. The Defendant could not chance the possibility that she might be able to identify him, or that the descriptions she would give would lead the police to him. Appreciating the dire consequences of being identified, the Defendant ordered Luis to shoot Mrs. Abraham, thereby also insuring his silence, and eliminating him as a witness.

After committing the murders, the Defendant immediately threw the incriminating evidence, the guns used in the killings, into the water, where they were never found.

OFFICIAL RECORD
17526 PG 3242

Over the years the Defendant impeded the investigation by the police by providing them with false information. The Defendant provided them with false information and lied about his whereabouts in order to protect himself. When he was arrested in 1985, he gave the police a false name and a false date-of-birth.

This Court finds without any doubt what so ever, that the Defendant clearly understood the criminality of his conduct.

One could argue, however, that the Defendant's ability to conform his conduct to the requirements of the law was substantially impaired. None of the mental health experts was, however, able to tell us what the Defendant's mental state was at the time these crimes were committed. The Defendant's friends and family have told this Court that the Defendant was kind, considerate, reliable and conscientious, that he simply used "poor judgement" in dealing with the financial stresses in his life and took out his frustrations on society. The Defendant told a Detective that he robbed people because he had a severe drug problem and needed money for drugs. The Defendant told the doctors that he used heroin and LSD, cocaine and Tylenol 3 on a regular basis and in substantial quantities.

The Defendant's crimes, these homicides and the robberies he committed prior to and subsequent to these homicides, show a well groomed, neatly dressed young man who used careful planning, rational thought, clear deliberation, and calm behavior when committing his crimes. These factors all militate strongly against the rash uncontrollable behavior of a psychotic individual or one impaired by drugs.

The Defendant's motivation was clearly greed. The Defendant coveted what others worked hard to earn. He wanted enough money to live a comfortable life style and to support

OFF REC BK
17526 PG 3243

his drug habit (as well as probably his wife's) without having to work for it. The Defendant had the ability to conform his conduct to the requirements of the law, but chose not to do so because he learned he could get away with it. He knew right from wrong and the consequences of his criminal conduct and chose to violate the law again and again.

This Court therefore rejects this mitigating circumstance and gives it the weight it deserves - which is no weight at all.

THE REMAINING STATUTORY MITIGATING CIRCUMSTANCES

This Court has considered all of the remaining statutory mitigating circumstances specifically 921.141(6)(a), (6)(c), (6)(e), (6)(g), even though no jury instruction was requested or argument made by the Defendant. After a careful review of all of the evidence, this Court finds that none of these remaining statutory circumstance have been established by the evidence and therefore do not assign any weight to these additional statutory mitigating circumstances.

ANY OTHER ASPECT OF THE DEFENDANT'S CHARACTER OR RECORD AND CIRCUMSTANCES OF THE OFFENSE WHICH WARRANT MITIGATION. FLA. STAT. 921(a)(h)

The Defendant offers the following factors for consideration by the Court in mitigation of the three homicides committed in this case:

1. That the Defendant suffers from a major mental illness.

OFF REC BK
17526 PG 3244

2. That the Defendant's mother has a history of mental problems which has impacted upon the Defendant.

3. That the Defendant has a history of drug abuse.

4. That disparate treatment of the Co-Defendant, Luis Rodriguez, who received a sentence of Life in prison.

In addition to these factors which were argued by the Defendant, this Court also considered factors which were not argued but which were presented through the testimony of witnesses or in letters sent to the Court by the Defendant, his family, and the Defendant's acquaintances. These factors include:

1. That the Defendant was a good brother and caring son.

2. That the Defendant has shown compassion towards the elderly in the past.

3. That the Defendant has been generous and caring towards Ms. Palmer-Michel who has AIDS.

4. That the Defendant had financial pressures due to his family's problems.

5. That the Defendant is a loving father.

6. That the Defendant, when he worked in the family business, was found to be reliable, responsible, dedicated and sincere in his duties.

1. THAT THE DEFENDANT SUFFERS FROM A MAJOR MENTAL ILLNESS

While the evidence presented did not support a finding that at the time these homicides

OFF.REC.BK
17526 PG 3245

were committed the Defendant was under the influence of extreme mental and emotional disturbance, this Court concludes that there was sufficient reliable evidence to support a finding that the Defendant does have mental "problems". While nearly every doctor who testified found the Defendant to be exaggerating his symptoms, faking his amnesia, and for the most part malingering, most believed that the Defendant did have some sort of an underlying mental illness. Whether the Defendant's mental problems stem from a mental illness, long-term substance abuse, or from over-medicating and improperly medicating the Defendant for an illness he never had, the Defendant does appear to have some degree of a mental health deficit. While this Court is unable to determine whether this "deficit" existed in 1984 when he committed these murders, this Court has chosen to give the Defendant the benefit of the doubt and did give this mitigating circumstance some weight.

2. THAT THE DEFENDANT'S MOTHER HAS A HISTORY OF MENTAL PROBLEMS WHICH HAS IMPACTED UPON THE DEFENDANT

The Defendant's mother has clearly suffered greatly over the years from sever and chronic depression. When the Defendant's mother discovered that her daughter Francis was using drugs, she became very depressed and eventually suffered a nervous breakdown. The Defendant's other sister, Myra Molinet testified that the Defendant would get depressed when he saw his mother in this condition. Despite the pain and depression Francis's drug use caused the Defendant's mother and the Defendant's sadness over his mother's pain, the Defendant moved out of his mother's house and began using heroin and cocaine, knowing full well the pain this would cause his mother. What this evidence demonstrates is the Defendant's self centered behavior and his

OFF REC BK
17526 PG 3246

total disregard for his mother's unstable mental health and her inability to cope with her children's uncontrollable behavior. When the Defendant began getting into trouble for stealing cars, the Defendant's mother experienced severe depression. Rather than changing his conduct to lessen his mother's pain, the Defendant continued to commit crimes. When the Defendant was arrested for armed robbery, his mother tried to take her life. But this still did not deter the Defendant's conduct. Since the Defendant's mother's mental health was not shown to have contributed to the Defendant's actions and it was actually shown that the Defendant's actions contributed to his mother's poor health, no weight was given to this factor as a mitigating circumstance.

3. THAT THE DEFENDANT HAS A HISTORY OF DRUG ABUSE

The Defendant's substance abuse problem most likely contributed to the Defendant's decision to commit these crimes. While the Defendant exaggerated his drug usage as he has exaggerated other symptoms, there was sufficient competent evidence for this Court to conclude that the Defendant's drug consumption was long-term and substantial. When the Defendant was arrested in 1989, he told Detective Starkey that he committed those robberies so he could purchase more drugs. The Defendant's sister testified that in 1977 the Defendant was using heroin and cocaine. When he was arrested in 1977, the Defendant reported that he had been using heroin and he also claimed to be ingesting LSD every day for three (3) to four (4) years. At this time the Defendant was experiencing hallucinations. Dr. Mutter concluded that the Defendant was experiencing substance abuse psychosis due to the Defendant's hallucinogenic drug use. Luis Rodriguez testified that the Defendant and his wife Cookie used cocaine and

OFF. REC. BK.
17526 PG 3247

smoked marijuana in 1984. Myra Molinet, the Defendant's sister, testified that she stayed away from the Defendant because she was trying to distance herself from the drug scene.

Based upon this evidence, it appears that the Defendant used drugs including heroin, LSD, cocaine, marijuana and Tylenol 3 tablets from 1977 on and off until his incarceration in 1989. The Defendant's drug usage must have been costly. The Defendant committed these murders and other crimes to help feed his drug habit. The Defendant's drug dependency therefore contributed to the commission of these homicides. Since there was no evidence presented to suggest that the Defendant received any meaningful treatment for his drug dependency, this Court gave substantial weight to this mitigating circumstance.

4. THE DISPARATE TREATMENT OF THE CO-DEFENDANT LUIS RODRIGUEZ, WHO RECEIVED A SENTENCE OF LIFE IN PRISON

This argument lacks any merit what so ever. The evidence established that the Defendant was the person who targeted the Josephs because he believed they had money and valuables in the apartment and planned the crimes committed against them. He then contacted Luis Rodriguez and enticed him to assist him in committing these crimes. It was the Defendant's gun and the Defendant who brought the gun to the scene. It was the Defendant who knocked on the Josephs' door and the Defendant who pushed his way into the Josephs' apartment when Mr. Joseph did not fall for the Defendant's "hostage" story. It was the Defendant who fired the first two shots and who killed Mr. and Mrs. Joseph. While Luis Rodriguez fired one shot into the left temple of Mrs. Abraham's head, he did so upon the direct order and upon the insistence of the

OFF. REC. BK.
17526 PG 3248

Defendant. Dr. Rao testified that this shot may not have inflicted fatal injury. The Defendant then shot each victim again in the head to make sure each of them died. This second shot to Mrs. Abraham's head and neck area, according to Dr. Rao, inflicted mortal injury. As the Defendant was the dominating force prior to, during, and after the homicides, the imposition of the death penalty where the Co-Defendant received life imprisonment, is warranted. See, Tafero v. State, 403 So. 2d 355 (Fla. 1981), Cert, Denied, 455 U.S. 983, 102 S. Ct. 1492, 71 L.Ed. 2d 694 (1982); Marek v. State, 492 So. 2d 1055 (Fla. 1986).

The evidence also established that Luis operated under the domination of the Defendant in committing these crimes. The Defendant was careful not to tell Luis that if the "hostage" scheme did not work that he intended to rob and kill the Josephs. The Defendant was clearly the one in control. He provided the gun and the gloves and ordered Luis to put on one pair and not to touch anything without the gloves on. The Defendant instructed Luis to search the bedroom for valuables. After the Defendant shot Mr. and Mrs. Joseph, he turned his gun upon Luis and ordered him to shoot Mrs. Abraham, yelling "Off Her! Off her! Do it!". The Defendant's domination over Luis clearly involved Luis in these homicides. See Heath v. State, 648 So. 2d 660 (Fla. 1994).

The Defendant's prior record includes at least seventy-one (71) prior crimes of violence against others, whereas the Co-Defendant has one prior felony conviction.

At the time of these murders, the Defendant was on parole, the Co-Defendant was not.

The Co-Defendant cooperated with the police, admitted to his involvement, pled guilty to these crimes, and testified against the Defendant at trial. The Defendant, instead, repeatedly lied to the police and gave them false information implicating people who were in no way

OFF. REC. BK.
17526 PG 3249

involved in the commission of these crimes. Instead of accepting responsibility for his actions, the Defendant, to this day, continues to blame others.

The disparate treatment between the Defendant and the Co-Defendant is therefore both morally and legally justified.

There was also evidence presented, for the most part through the letters sent to this Court, which claims that the Defendant was a good brother, a loving father and a caring son. Ms. Palmer-Michel states that the Defendant has shown compassion toward her and others and his family claims that when the Defendant worked in the family business, he was reliable and sincere in his duties.

While it appears that the Defendant has at times shown love and compassion for his family and friends, the Defendant has clearly presented quite a different side to all those he has chosen to target and to victimize. The Defendant's list of victims ranges from the young to the old, both male and female and certainly militates against a finding that the Defendant has any real compassion for others. The Defendant has not only terrorized countless strangers who he has robbed, he has also caused his mother and family great pain. The Defendant's criminal conduct resulted in his mother's attempts to take her own life. Having spent most of his adult life in prison, the Defendant has left his children without a father. The Defendant's sister Ms. Molenet testified that she stayed away from the Defendant because she was trying to stop using drugs and he was a negative influence upon her.

While the Defendant did have heartache and sadness in his life, including his mother's illness, the death of one of his infant daughters, and his other daughter's medical problems, the Defendant appears to have dealt with these unfortunate realities by lashing out at society in

OFF REC BK
17526 PG 3250

general, victimizing those who have in no way contributed to these twists of fate.

While this Court has considered each and every one of these mitigating factors, the weight given to them is minimal.

CONCLUSION

This Court finds that the State has established beyond and to the exclusion of every reasonable doubt the existence of six aggravating circumstances. The weight given to each of these aggravating circumstances has been previously discussed.

The Court has rejected the three statutory mitigating circumstances presented by the defense, as well as those not argued.

The Court is reasonably convinced of several non-statutory mitigating circumstances and gave these factors substantial, moderate and minimal weights as previously indicated.

In weighing the aggravating circumstances against the mitigating circumstances, the Court is cognizant that the process is not simply an arithmetical one. It is not a weighing of numbers. It is a qualitative as opposed to a quantitative process. The Court must and does look to the nature and quality of the aggravators and the mitigators which it has found to exist.

This Court finds that the aggravating circumstances clearly and remarkably outweigh the mitigating circumstances. This Court finds that even if this Court had not found that these murders were committed in a cold, calculated and premeditated manner and/or that the dominant motive for the killings was to eliminate these people as witnesses, the aggravating circumstances would still have greatly outweighed the mitigating circumstances. The Defendant's offered

[OFFICIAL RECORD]
17526PG3251
1739

mitigating circumstances pale when considered and weighed against the fact that the Defendant committed two contemporaneous murders to each individual murder, that he has previously been convicted of some seventy (70) or more violent felony offenses, that these murders were committed in two of the victims own home and in the home where the third victim had visited countless times, and that these homicides were all committed while the Defendant was on parole for an armed robbery. Bea Sabe joseph, Sam joseph and Genevieve Abraham were three elderly people. The Defendant wrote this Court that the Josephs were wonderful people who were kind to everyone including him. Mrs. Abraham was a stranger to the Defendant, and yet all three were coldly and deliberately murdered by the Defendant and/or at the Defendant's insistence.

This Court is also mindful of the strong recommendation given by the jury, a 12-0 recommendation of death by electrocution, and as is required, gave the jury's recommendation great consideration. This jury represents a cross section of our community and they are the collective voice of this community, and that voice has said with unmistakable clarity and with a unanimous voice, that the murders of Sam Joseph, Bea Sabe Joseph and Genevieve Abraham, considering the nature and circumstances of their murders, sets each one apart from other first degree murders in this community and is of such a nature that the Defendant should be sentenced to die for his actions.

SENTENCE

As to Count One of the Indictment, for the first Degree murder of Bea Sabe Joseph this Court hereby sentence you, Manuel (Antonio) Rodriguez to Death.

As to Count Two of the Indictment, for the First Degree Murder of Sam Joseph this Court

OFFICIAL RECORDS
17526 PG 3252

hereby sentences you, Manuel (Antonio) Rodriguez to Death.

As to Count Three of the Indictment, for the First Degree Murder of Genevieve Marie Abraham this Court hereby sentences you, Manuel (Antonio) Rodriguez to Death.

As to Count Four of the Indictment, for the offense of Armed Burglary With An Assault, this Court hereby departs from the sentencing guidelines and sentences you to Life imprisonment with a three year minimum mandatory for the use of a firearm. This sentence is to run consecutive to the sentences imposed in Count I, II and III, and consecutive to the sentences you are currently serving for crimes unrelated to this case. As grounds for departure, this Court relies on the unscoreable nature of the capital felonies and the numerous unscoreable felony offenses which were committed and for which you were convicted for subsequent to the commission of this offense Hansbrough v. State, 509 So. 2d 1081 (Fla. 1987), Torres-Arboledo v. State, 524 So. 2d 404 (Fla. 1988). While the Defendant clearly qualifies as a violent habitual offender, since Life felonies were excluded from habitual offender punishment at the time these offenses were committed and were charged, this Court believes it is prohibited from sentencing the Defendant as such and therefore declines to do so.

It is Further Ordered that you, Manuel (Antonio) Rodriguez, be taken by the proper authorities to the Florida State Prison and there be kept in close confinement until the date of your execution, and that on such scheduled date, that you Manuel (Antonio) Rodriguez, be put to death.

You are hereby notified that this sentence is subject to automatic review by the Florida Supreme Court.

OFFICIAL RECORD
17526 PG 3253

DONE AND ORDERED in Open Court, at Miami, Dade County, Florida this 31st day of January, 1997.

LESLIE B. ROTHENBERG
Circuit Court Judge

cc: Abraham Laeser, Esquire
Ruth Solly, Esquire
Anita Gay, Esquire
Assistant State Attorneys

Richard Houlihan, Esquire
Eugene Zenobi, Esquire
Attorneys for the Defendant

Department of Corrections

The Honorable Leslie B. Rothenberg

c:\wpwin\doc\1rodrgz.sen

OFF REC BK