IN THE SUPREME COURT OF FLORIDA

AUBREY ARTHUR LIVINGSTON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 61,967

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

	PAGE
TABLE OF CITATIONS	ii,iii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	3-4
POINTS INVOLVED	5-6
ARGUMENT -	7-22
POINT I	
THE TRIAL COURT DID NOT ERR IN IMPOSING THE DEATH PENALTY ON APPELLANT.	7-18
A	
THE TRIAL COURT DID NOT ERR IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY SENTENCING APPELLANT TO DEATH WHERE HE INTENDED OR CONTEMPLATED THAT LIFE WOULD BE TAKEN.	
(Restated.)	
B	
THE TRIAL COURT DID NOT ERR IN OVERRIDING THE ADVISORY VERDICTS OF THE JURY FOR LIFE SENTENCES.	
C	
THE TRIAL COURT PROPERLY FOUND AS AN AGGRAVATING FACTOR THAT THE APPELLANT IN COMMITTING THE CRIME KNOWINGLY CREATED A GREAT RISK OF DEATH TO MANY PERSONS.	
D	
THE TRIAL COURT PROPERLY FOUND AS AN AGGRAVATING FACTOR THAT THE CRIMES WERE COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST.	

PAGE

E

THE TRIAL COURT PROPERLY FOUND THAT THE CAPITAL FELONY WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

F

THE TRIAL COURT DID NOT ERR IN FINDING AS A MITIGATING FACTOR THAT APPELLANT HAS NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY.

G

THE TRIAL COURT DID NOT ERR IN FINDING AS A MITIGATING FACTOR THAT APPELLANT WAS AN ACCOMPLICE IN THE OFFENSE AND THE APPELLANT'S PARTICIPATION WAS RELATIVELY MINOR.

POINT II

THE TRIAL COURT DID NOT ERR BY SEPARATING AND SENDING THE JURORS HOME FOR THE WEEKEND IMMEDIATELY UPON BEING ADVISED BY THE FOREMAN THAT THE JURY COULD NOT REACH A UNANIMOUS VERDICT. 19

POINT III

THERE WAS NO ERROR REGARDING DEPOSITION TESTIMONY. 20

POINT IV

THE TRIAL COURT DID NOT ERR IN SENTENCING THE APPELLANT ON COUNTS VI THROUGH X AS THEY WERE NOT UNDERLYING CRIMES FOR A FELONY MURDER. 21-22

Table of Contents (cont)

	PAGE
CONCLUSION	23
CERTIFICATE OF SERVICE	23

TABLE OF CITATIONS

	PAGE
CASES:	
Adams v. State, 412 So.2d 850 (Fla. 1982)	15
Bolender v. State, No. 59,333 (1982 F.L.W. 490) [October 28, 1982]	9
Borges v. State, 415 So.2d 1265 (Fla. 1982)	21
Brown v. State, 381 So.2d 690 (Fla. 1980)	13
Enmund v. Florida, ___U.S.___ 102 S.Ct. 3368 73 L.Ed.2d 1140 (1982)	7
Daughtery v. State, 419 So.2d 1067 (Fla. 1982)	18
Ford v. State, 374 So.2d 496 (Fla.) cert. denied, 445 U.S. 972 100 S.Ct. 1666 64 L.Ed.2d 249 (1979)	19
Furman v. Georgia, 408 U.S. 238 92 S.Ct. 2726 33 L.Ed.2d 346 (1972)	10
Hegstrom v. State, 401 So.2d 1343 (Fla. 1981)	21
Hitchock v. State, 413 So.2d 741 (Fla. 1982)	15
King v. State, 390 So.2d 315 (Fla. 1980) cert. denied, 450 U.S. 989 101 S.Ct. 1529 67 L.Ed.2d 825	18
Lewis v. State, 398 So.2d 432 (Fla. 1981)	13
Lucas v. State, 376 So.2d 1149 (Fla. 1979)	13

Table of Citations (cont)

	PAGE
CASES:	
McDermott v. State, 383 So.2d 712 (Fla. 3d DCA 1980)	19
Mines v. State, 390 So.2d 332 (Fla. 1980)	13
Proffitt v. Florida, 428 U.S. 242 96 S.Ct. 2960 49 L.Ed.2d 913 (1976)	10
Ruffin v. State, 397 So.2d 277 (Fla.) cert. denied, 454 U.S. 882 102 S.Ct. 368 70 L.Ed.2d 194 (1981)	18
Smith v. State, No. 57,743 (1982 F.L.W. 487 [Oct. 28, 1982]	9
Spaziano v. State, 393 So.2d 1119 (Fla. 1981)	17
State v. Dixon, 283 So.2d 1 (Fla. 1973) cert. denied, 416 U.S. 943 (1974)	9
Stevens v. State, 419 So.2d 1058 (Fla. 1982)	9
Tedder v. State, 322 So.2d 908 (Fla. 1975)	9
Welty v. State, 402 So.2d 1159 (Fla. 1981)	12
White v. State, 415 So.2d 719 (Fla. 1982)	14
Williams v. State, 386 So.2d 538 (Fla. 1980)	13
OTHER AUTHORITY:	
Fla.R.Crim.P. 3.370	19

PRELIMINARY STATEMENT

The Appellant was the Defendant in the lower court. The Appellee was the Plaintiff in the lower court. All parties will be referred to as they stand in this Court.

The symbol "R" will denote the Record on Appeal. All emphasis added unless otherwise indicated.

STATEMENT OF THE CASE

The Appellee accepts the Appellant's Statement of the Case with the following correction:

As to the assertion that the Appellee entered into a stipulation with Appellant that he had no significant criminal history, a reading of the transcript reveals that the state attorney was referring to prior convictions and record which relate to the aggravating circumstance of record of prior convictions (R 1030).

STATEMENT OF THE FACTS

The Appellant's Statement of the Facts are facts taken in the light most favorable to the Defendant/Appellant. The Appellant's version was not believed by the jury as he was found guilty on all counts as charged (R 1234-1244). The Appellee, therefore, supplements the Appellant's Statement of the Facts with the following:

On the night of the murders, the co-defendant Jackson, did not have a firearm as testified to by the only eyewitness, Karen Jackson (R 668). Livingston was carrying a gun (R 668). Jackson owned a gun but it was larger than the one that Livingston had (R 669). The Appellant stood in the front room with his gun watching one of the victims, Mrs. Washington, and her two children to make sure that nobody left (R 669).

The five victims were herded into the back of a camper, to be held hostage (R 674). The Appellant, armed with a firearm, got in the back with the victims (R 675-676). Co-defendant Jackson, Karen Jackson, and their two children got in the cab of the truck (R 674, 677).

Karen Jackson testified that she did not see who actually shot the three adults but both the Appellant and Jackson were outside the truck and behind it (R 682). The victims were shot with a .38 caliber gun (R 734). The Appellant told Jackson to hurry up and then the automobile that contained the three dead victims and two live children was ignited (R 680, 683).

The Appellant stated in his taped statement that the victims knew they were going to be killed "probably after

coming in their house like that I think they probably thought so." (R 770).

POINTS INVOLVED

POINT I

WHETHER THE TRIAL COURT ERRED IN IMPOSING THE DEATH PENALTY ON APPELLANT?

A

THE TRIAL COURT DID NOT ERR IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY SENTENCING APPELLANT TO DEATH WHERE HE INTENDED OR CONTEMPLATED THAT LIFE WOULD BE TAKEN.

(Restated.)

B

THE TRIAL COURT DID NOT ERR IN OVERRIDING THE ADVISORY VERDICTS OF THE JURY FOR LIFE SENTENCES.

C

THE TRIAL COURT PROPERLY FOUND AS AN AGGRAVATING FACTOR THAT THE APPELLANT IN COMMITTING THE CRIME KNOWINGLY CREATED A GREAT RISK OF DEATH TO MANY PERSONS.

D

THE TRIAL COURT PROPERLY FOUND AS AN AGGRAVATING FACTOR THAT THE CRIMES WERE COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST.

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THE TRIAL COURT PROPERLY FOUND THAT THE CAPITAL FELONY WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

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THE TRIAL COURT DID NOT ERR IN NOT FINDING AS A MITIGATING FACTOR THAT APPELLANT HAS NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY.

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POINT II

WHETHER THE TRIAL COURT ERRED BY SEPARATING AND SENDING THE JURORS HOME FOR THE WEEKEND IMMEDIATELY UPON BEING ADVISED BY THE FOREMAN THAT THE JURY COULD NOT REACH A UNANIMOUS VERDICT?

POINT III

WHETHER THERE WAS ERROR REGARDING DEPOSITION TESTIMONY?

POINT IV

WHETHER THE TRIAL COURT ERRED IN SENTENCING THE APPELLANT ON COUNTS VI THROUGH X AS THEY WERE NOT UNDERLYING CRIMES FOR A FELONY MURDER?

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN IMPOSING THE DEATH PENALTY ON APPELLANT.

A

THE TRIAL COURT DID NOT ERR IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY SENTENCING APPELLANT TO DEATH WHERE HE INTENDED OR CONTEMPLATED THAT LIFE WOULD BE TAKEN.

(Restated.)

In Enmund v. Florida, ___U.S.___, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), the Supreme Court held that the Eighth and Fourteenth Amendments were violated by the imposition of the death penalty on the defendant, who aided and abetted a felony in the course of which a murder was committed by others but who did not himself kill, attempt to kill, intend to kill, or contemplate that life would be taken. The facts of the instant case makes Enmund totally inapplicable. In Enmund, the defendant was the driver of a getaway car to be used after a robbery. During the course of the robbery of an elderly couple at their farmhouse, the wife came out of the house when her husband cried for help and shot one of the robbers. Both the husband and wife were then shot by the robbers. Enmund was sentenced to death for his role as a principal of the second degree, constructively present aiding and abetting the commission of the crime of robbery. This Honorable Court affirmed. In

reversing, the Supreme Court stated that "(i)t was thus irrelevant to Enmund's challenge to the death sentence that he did not himself kill and was not present at the killings; also beside the point was whether he intended that the Kerseys [the victims] be killed or anticipated that lethal force would or might be used if necessary to effectuate the robbery or a safe escape." Id., 73 L.Ed.2d at 1146. The Court concluded that imposition of the death penalty in these circumstances was inconsistent with the Eighth and Fourteenth Amendments.

In the instant case, however, the Appellant was present at the killings (R 682). Further, it cannot be seriously debated but that the Appellant contemplated that life would be taken. The day of the murders, it was the Appellant who held a gun in order to make certain that nobody left the Washington residence (R 669). It was the Appellant who sat is the back of the camper with a gun and the victims while co-defendant Jackson drove around (R 676, 680). The Appellant and co-defendant Jackson were both outside the truck and behind it when the three adult males were shot (R 682). The two adult males' hands were either handcuffed or tied behind their backs (R 684, 764). In a taped statement to the police, the Appellant said that the victims probably knew that Jackson was going to kill them after he broke down the door of the Washington's home in order to get in (R 770). The Appellee submits that the Appellant, too, knew or contemplated that lives would be taken as distinguished from Enmund where the murders were spontaneous. Therefore, Enmund v. Florida, supra, is not authority for vacating the death sentences imposed on Counts I

through V. Accord, Smith v. State, No. 57,743 (1982 F.L.W. 487) [Oct. 28, 1982]. As in Smith, there was sufficient evidence from which the jury could have found the Appellant guilty of premeditated murder. No direct evidence was presented as to who actually pulled the trigger and killed the three adults. The Appellant was the only one seen with a gun (R 668). Although co-defendant Jackson owned a gun, it was not the same caliber as the gun that killed the victims (R 601-608).

B

THE TRIAL COURT DID NOT ERR IN OVERRIDING THE ADVISORY VERDICTS OF THE JURY FOR LIFE SENTENCES.

The law in Florida is that the sentencing judge must accord great weight to a jury's recommendation of life imprisonment, but may decline to follow it if the facts indicating that a sentence of death is appropriate under the law are "so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). The Appellee respectfully submits that the instant record amply supports the judge's findings of five aggravating circumstances and a total lack of mitigating circumstances. Therefore, death is the appropriate punishment. Bolender v. State, No. 59,333 (1982 F.L.W. 490)[Oct. 28, 1982]; Stevens v. State, 419 So.2d 1058 (Fla. 1982); State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974).

The Appellee respectfully submits that the mitigating circumstances as perceived by defense counsel (Initial Brief, p. 20) are not valid mitigating factors discernible from the

record that would justify the recommendation of life.

In Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the Supreme Court held that the imposition of the death sentence under certain state statutes constituted cruel and unusual punishment because under such statutes the juries had untrammeled discretion to impose or withhold the death penalty. In response to Furman, the Florida legislature adopted the present death penalty statute which statute the Supreme Court held did not violate the prohibition against the infliction of cruel and unusual punishment. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed. 913 (1976). Under Florida's death penalty statute, the jury is directed to weigh the aggravating and mitigating circumstances specified in the statute and return an advisory verdict as to the sentence." It is only advisory; the actual sentence is determined by the trial judge." Id., 428 U.S. at 249. If the trial court imposes the death sentence, it must set forth in writing its fact findings that sufficient statutory aggravating circumstances exist and are not outweighed by statutory mitigating circumstances.

In the instant case, the jury returned an advisory sentence of life imprisonment. The trial judge then performed its duty, as the sentencing authority in Florida, Proffitt, id., 428 U.S. at 251, by weighing the eight aggravating factors against the seven mitigating factors and determined that the death penalty should be imposed by law. The basic difference between the Florida system, upheld by the United States Supreme Court, and the Georgia system, struck down by the United States

Supreme Court,

> is that in Florida the sentence is determined by the trial judge rather than by the jury. This Court has pointed out that jury sentencing in a capital case can perform an important societal function [cite omitted] but it has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.

Proffitt, id., 428 U.S. at 252. The Appellee respectfully submits that had the trial judge not overridden the jury's advisory sentence and, consequently, not performed its statutory duty, then Florida's death penalty statute would be unconstitutional as being imposed in an arbitrary and capricious manner, on the whim of the jury, in contravention of Furman. The Florida system satisfies the constitutional deficiencies identified in Furman but unless a trial judge continues to perform its duty and override a jury recommendation of life, when such override is warranted by the application of the statutory aggravating and mitigating circumstances, then our system has returned to pre-Furman and would not pass constitutional muster. The Appellant may have gotten sympathy from the jury but he received his constitutional guarantees from the trial judge.

C

THE TRIAL COURT PROPERLY FOUND AS AN AGGRAVATING FACTOR THAT THE APPELLANT IN COMMITTING THE CRIME KNOWINGLY CREATED A GREAT RISK OF DEATH TO MANY PERSONS.

The Appellee must initially take issue with the Appellant's statement that "the three adult victims were shot by Douglas Jackson at point blank range." (Initial Brief, p. 22). As discussed infra, there was no evidence presented as to the actual triggerman other than Patsy Roebuck's testimony as to what Karen Jackson allegedly told her (R 853). Karen Jackson's trial testimony contradicted her alleged statements made to Ms. Roebuck (R 680).

In Welty v. State, 402 So.2d 1159 (Fla. 1981), this Court upheld the trial court's finding that the defendant created a great risk of death to many persons when he set fire to the victim's bed. "There were six elderly people asleep in the building in which the victim's condominium was located. This can be classified as many persons." Id. at 1164. In the case at bar, the Appellant and his co-defendant originally herded eight (8) persons into Jackson's truck but Jackson's young son was dropped off at home and left to sleep (R 674, 678). The Appellant was the one who kept a gun on the eight persons in the home in order to make sure that nobody left (R 669). The Appellant was also in the back of the camper with the three adults and two small children who were the eventual murder victims to make sure nobody got out (R 675).

The Appellee respectfully submits that if the six (6) persons in Welty constituted "many people" then certainly seven (7) persons constitutes no less than "many people." The fact that five (5) of the "many people" were later actual victims does not alter the fact that the Appellant created a great risk of death [a risk so great that five (5) were eventually murdered] to many persons.[1/] Cf., Lewis v. State, 398 So.2d 432 (Fla. 1981)(evidence that defendant acted with total disregard for safety of two bystanders was not enough to establish aggravating circumstance of knowing creation of great risk of death to many persons; Williams v. State, 386 So.2d 538 (Fla. 1980)(risk of death to two persons not sufficient to support finding that defendant knowingly created a great risk of death to many persons); Brown v. State, 381 So.2d 690 (Fla. 1980)(where there was no evidence that lives of more than one or two persons were threatened by subject homicide, improper to find created a great risk of serious bodily harm and death to many persons).

Not only were the victims, Mrs. Jackson, and Antoinette Jackson placed in great risk of death, the Defendant had knowingly created a great risk of death to many other persons because he should have reasonably foreseen that the igniting and burning of the automobile would pose a great risk to the firefighters and the police who responded to the call as well as to the residents in the area had the surrounding wooded area

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[1/] Co-defendant Jackson's young son would not be included as not being a part of the "conduct surrounding the capital felony for which the defendant is being sentenced." Lucas v. State, 376 So.2d 1149, 1153 (Fla. 1979); Mines v. State, 390 So.2d 332 (Fla. 1980).

caught fire (R 483, 500). Welty, supra. There can be no question but that the Appellant knew Jackson was going to ignite the automobile that contained the three adults and two live children as he told Jackson "to hurry up" after the adults were shot (R 682-683). Therefore, under authority of this Court, the trial court properly found as an aggravating factor that the Appellant in committing the crime knowingly created a great risk of death to many persons.

D

THE TRIAL COURT PROPERLY FOUND AS AN AGGRAVATING FACTOR THAT THE CRIMES WERE COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST.

As acknowledged by Appellant, he had no motive to kill any of the victims nor did he receive (directly or indirectly) any benefit or revenge from their deaths (Initial Brief, pp. 20-21). The Appellee respectfully submits that said fact supports a finding that the murders were committed for the purpose of avoiding or preventing a lawful arrest for the kidnapping offenses. White v. State, 415 So.2d 719 (Fla. 1982). The victims were initially "taken hostage" (R 677). After driving the victims around in the truck for a while, the victims were taken to an isolated wooded area where they were put into an abandoned automobile which was then ignited with gasoline (R 680). The Appellee respectfully submits that the burning of the victims who knew and could identify the Appellant in an isolated area supports the trial court's finding that the murders were committed for the pur-

pose of avoiding or preventing a lawful arrest for kidnapping. Adams v. State, 412 So.2d 850, 856 (Fla. 1982)(encasing body in white plastic bags, tying it with rope, and disposing of the body in an isolated area supported trial court's finding).

In his motion for particulars relating to sentencing, the Appellant requested response to "(w)hether upon a conviction of first degree murder the State will seek the death penalty?" (R 1153). Rather than committing a discovery ambush of Appellant as he so alleges, the state attorney candidly stated at the hearing that he had never recommended a death penalty (parenthetically, he did not do so in the instant case either) but that what he would do was "simply list what I felt were aggravating circumstances that could perhaps justify a jury recommendation." (R 15). Since the State was not seeking the death penalty, the State need not have gone any further in responding to the Appellant's motion and the personal attack on the state attorney is unjustified. There is no requirement that the State notify defendants of the aggravating factors that the State intends to prove. Hitchcock v. State, 413 So.2d 741 (Fla. 1982).

E

THE TRIAL COURT PROPERLY FOUND THAT THE CAPITAL FELONY WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

Again, the Appellee would point out that there was no direct evidence that Douglas Jackson killed the five victims. Also the Appellee disputes the Appellant's assertion that the

State's theory of the case was felony murder. In the State's opening statement, the state attorney stated that "I believe Douglas Jackson is the one that set fire to the car. Either Mr. Jackson or Mr. Livingston shot those people." (R 464). The Appellee can and will, therefore, argue premeditation to justify the trial court's finding that the murders were committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

This Honorable Court's sentence review function is to determine whether there was sufficient competent evidence in the record from which the judge could properly find the presence of an appropriate aggravating circumstance. Adams v. State, 412 So.2d 850, 855 (Fla. 1982). The Appellee respectfully submits that there is sufficient competent evidence in the record to support the following finding:

> (i)This aggravating circumstance applies in this case. This instant offense was a premeditated homicide with elements of it being done in a cold, calculated manner. From the evidence presented, it appears that the victims had, on prior occasions, given safety and refuge to the co-defendant's wife during marital disputes. In an effort to prevent this from occurring again, it appears that the co-defendant's only alternative was to dispose of Walter Washington and his paramour, Edna Manuel Washington. Also killed were Larry Finney, the alleged boyfriend of the co-defendant's wife. During the homicide of these three adults, two infants were apparently killed due to their being siblings of Washington and his paramour. Following these cruel and brutal executions, the bodies were dis-

posed of in a most heinous way. After the commission of the offense, the subject returned to Dade County, Florida, where he continued to maintain his lifestyle, showing absolutely no feelings or remorse for the act. As referred to in paragraph (H) supra, this deed could not have occurred without the active assistance of this defendant.

F

THE TRIAL COURT DID NOT ERR IN NOT FINDING AS A MITIGATING FACTOR THAT APPELLANT HAS NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY.

The Appellant has offered no case authority for this proposition as the Appellee submits, there is none. In considering a defendant's prior criminal record as an aggravating circumstance, the trial judge is limited to only those offenses for which the defendant was previously convicted. Spaziano v. State, 393 So.2d 1119 (Fla. 1981). However, there is no limitation requiring convictions as to the mitigating circumstance of no significant history of prior criminal activity. The state attorney in the instant case was referring to the aggravating circumstance of a prior record (R 1031).

As to the mitigating circumstance of no significant history of criminal activity, the trial court was eminently correct in finding that it did not apply as the Appellant was convicted o marijuana, misdemeanor in 1977 (R 1032) and he was on probation for burglary at the time he committed the murders (R 1032). Additionally, when the Appellant was sentenced to death, he had previously been convicted of six (6) counts

of kidnapping (R 1260). The prior convictions for these capital felonies are alone sufficient to negate the mitigating factor of no significant history of prior criminal activity. Daughtery v. State, 419 So.2d 1067 (Fla. 1982); Ruffin v. State, 397 So.2d 277 (Fla.),cert. denied, 454 U.S. 882, 102 S.Ct. 368, 70 L.Ed.2d 194 (1981); King v. State, 390 So.2d 315 (Fla. 1980), cert. denied, 450 U.S. 989, 101 S.Ct. 1529, 67 L.Ed.2d 825 (1981).

G

THE TRIAL COURT DID NOT ERR IN FINDING AS A MITIGATING FACTOR THAT APPELLANT WAS AN ACCOMPLICE IN THE OFFENSE AND THE APPELLANT'S PARTICIPATION WAS RELATIVELY MINOR.

The evidence does not support the Appellant's allegation that his role was minor, as discussed supra. The Appellee would direct this Court's attention to the testimony of the only eyewitness to the murders, Karen Jackson (R 652-692) and the Appellant's taped statement wherein he acknowledged that he knew the victims were going to be murdered (R 748-778). The trial court's finding is amply supported by competent evidence.

POINT II

THE TRIAL COURT DID NOT ERR BY SEPARATING AND SENDING THE JURORS HOME FOR THE WEEKEND IMMEDIATELY UPON BEING ADVISED BY THE FOREMAN THAT THE JURY COULD NOT REACH A UNANIMOUS VERDICT.

Florida Rule of Criminal Procedure 3.370 allows an impaneled jury to separate upon due admonition. McDermott v. State, 383 So.2d 712 (Fla. 3d DCA 1980). In the case at bar, the trial court admonished the jury before allowing them to separate for the weekend out again when court resumed (R 1013, 1015-1018). The issue is whether the trial court abused its discretion. Ford v. State, 374 So.2d 496 (Fla.), cert. denied, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1979). Absent a showing of the existence of unfair or unduly pervasive media coverage of this trial or the events which preceded it, there is no abuse of discretion. Id., 374 So.2d at 499. The Appellant has made no attempt to show the above. Therefore, the Appellee respectfully submits that the trial court did not err in separating the jury for the weekend.

POINT III

THERE WAS NO ERROR REGARDING DEPOSITION TESTIMONY.

The trial court generally granted the motion to compel presence of Defendant at depositions but reserved ruling as to witness Karen Jackson (R 24). The court stated that if the state attorney determined that there was a serious problem with Karen Jackson, then "perhaps you and I and Mr. Smith can conduct an in camera proceeding between the four of us, to make a determination if there should be a protective order entered in that one witness' case." (R 24). The Appellant has made the bold allegation that the State refused to transport Appellant to said depositions as ordered by the trial court (Initial Brief, p. 35). However, the Appellant has failed to support this allegation by a citation to the record on appeal wherein the State refused. The Appellant, therefore, has not met his burden of showing error.

POINT IV

THE TRIAL COURT DID NOT ERR IN SENTENCING THE APPELLANT ON COUNTS VI THROUGH X AS THEY WERE NOT UNDERLYING CRIMES FOR A FELONY MURDER.

The State from the outset proceeded on an indictment by a premeditated design, not on felony murder, and argued the same to the jury (R 1103). Thus, the instant point on appeal is totally without merit.

In Borges v. State, 415 So.2d 1265 (Fla. 1982), this Court held that a defendant may be convicted and sentenced for every legislatively defined crime he commits, excluding lesser included offenses. The Appellant in the instant case was found guilty of five (5) counts of premeditated murder as charged (R 1234-1238) and six (6) counts of kidnapping (R 1239-1244). In Hegstrom v. State, 401 So.2d 1343, 1346 (Fla. 1981), this Court held that "(b)ecause the crime of first degree murder committed during the course of a robbery requires, by definition, proof of the predicate robbery, the latter is necessarily included within the former" so that a defendant could be convicted of both but not sentenced for both murder and robbery.

In the instant case, however, the murders were not committed in the course of the kidnappings. But, rather, the proof showed that the kidnappings were committed in order to facilitate the murders rendering Hegstrom inapplicable (R 770). There was proof of the murders independent of the proof of the kidnappings. Therefore, under the authority of Borges,

supra, the Appellant's multiple convictions and sentences are proper. Accord, Hegstrom, supra.

CONCLUSION

Based on the foregoing Argument, the Appellee respectfully requests that this Honorable Court affirm the judgment and sentence of the trial court.

Respectfully submitted,

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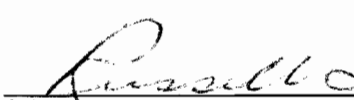
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished, by mail, to H. T. Smith, Esq., 1017 Northwest 9th Court, Miami, Florida 33136, this 23rd day of December, 1982.



Of Counsel