IN THE

SUPREME COURT OF FLORIDA

JOHNNY WILLIAMSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

CASE NO. ~~CF-130~~ 68800

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT
IN AND FOR DIXIE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

Appellee accepts the statement of the case provided by Appellant as being substantially accurate.

STATEMENT OF THE FACTS

Appellee rejects the statement of the facts provided by Appellant as being incomplete.

Appellant and two co-defendants (Omer James Williamson and James Robertson) were charged by indictment with murder in the first degree and possession of contraband in prison. (R 1) All three defendants and the victim, Daniel Drew, were inmates serving time in Cross City Correctional Institution. Appellant stabbed Drew to death outside the mainenance shop building while Omer Williamson held Drew from behind, and Robertson served as the 'lookout'. (R 520-526)

Prior to trial, Omer Williamson pleaded guilty as charged and agreed to testify in return for the state agreeing to not seek the death penalty. (R 584) At trial Omer testified that he and Appellant (otherwise known as "Bama") were 'partners' and were selling drugs (marijuana) for Drew. (R 501-502) After selling some drugs by putting them out on credit, Omer ended up owing $15.00 to Drew. (R 504) Omer and Appellant had become disillusioned with Drew, and Omer decided he was not going to

repay Drew the $15.00 debt. (R 504) Omer told Appellant that he would fight Drew if Drew pressed him for the $15.00. (R 510) Appellant told Omer he couldn't do that becuase Drew is a 'country boy' who would stab Omer, and that "if you ain't going to pay him we're going to have to kill him." (R 510) Omer told Appellant he'd have to think about that. (R 510) Later in the week the conversation resumed, with Appellant again telling Omer that they would have to kill Drew. (R 511) Omer asked Appellant what the plan was, and Appellant told Omer he would meet with him later to discuss the plan. (R 511)

Later, Appellant outlined his plan to Omer for murdering Drew. (R 511-512) The plan was to go behind the maintenance shop after 3-3:30 p.m. when the area was clear of people. (R 511-512) However, they needed to acquire a knife, and Appellant asked Robertson ("chickenhead") if he could get them a knife. (R 512) Chickenhead asked what they needed a knife for, and Appellant replied: "We're going to kill somebody." (R 515) Omer told Appellant he had a sharpened metal rod which could be used. (R 517) (Ironically, this rod had been sharpened to a point by Drew, the victim. (R 517)) Appellant asked Chickenhead Robertson to be their lookout. (R 519-520)

When the time came, Appellant and Omer walked into the maintenance area compound and proceeded to stand between the paint shop and the storage shop. (R 522) Omer passed the rod to Appellant, who put the rod inside his pants. (R 522) An

old man came out of the shop, and Appellant asked the old man (Harris) to have Drew come outside. (R 523) After Harris went in to find Drew, Appellant told Omer that when 'Drew comes out he (Appellant) was going to tell Drew that some nigger beat Omer for some money and that we need a knife.' (R 523) Appellant told Omer that then he would "run the rod through him." (R 523) Omer testified that:

> Originally we had said that we were going to give him $5, just in case we had got busted on this murder, that it could look like we had given him some money. That we didn't rob him or anything, but we had given him some money, and that he got upset with us and pulled out a knife. And Bama took the knife away from him and stabbed him up. That was just if we got busted. But we knew he didn't have any money, and we wanted to put come in his pockets.

(R 525)

Drew came out of the building; Appellant handed Drew $5.00 and said he hadn't collected the rest yet, and that some nigger had beat Omer for $10.00. (R 524) Appellant told Drew they were going to get the money for him, but they needed a knife. (R 524-525) Drew had supposedly been making a knife for Appellant. (R 525) Drew handed Appellant the knife he had made. (R 526) Omer grabbed Drew from behind, by the throat; Appellant started stabbing Drew. (R 526) Omer threw Drew down on the ground and kicked him in the head a couple of times. (R 526) Appellant continued to stab Drew, and blood was squirting out all over the place. (R 527) Appellant took out the long rod, straddled

Drew, and tried to run him through with the rod. (R 527)

Appellant and Omer left the scene; Omer went back to his cell and washed the blood off the rod and stuck it down the drain in the sink. (R 528-529) Another inmate (Presley) noticed that Omer had blood on his shoes. (R 532) Appellant had told Presley about the murder. (R 531) Chickenhead Robertson told Omer that he had told Mark Bishop what had happened, and that Bishop was with Robertson when he disposed of the knife, and that Bishop had turned the knife over to investigator Dixon. (R 534)

Omer testified that Appellant came up with a 'story' for them to use regarding the murder:

> He said that if things got bad--all right. The story was that--okay. That we had gone over there. Me and Chickenhead had gone over there with him. That he was going to pay the money to Drew. He only had $5, so he gave the $5 to Drew, and Drew became upset because that's all he had was $5, and that there was an argument. And I was supposed to be sitting on some pipe. And I wasn't supposed to be hearing this conversation. That all I could tell was that there was an argument. Drew became mad and pulled the knife out. Bama knocked the knife away and fell against the building. I heard it click, and that Bama picked it up and started stabbing Drew, and I was supposed to have ran away.

(R 537)

Appellant also told Omer, after the murder while they were

both at Florida State Prison, that since the authorities did not yet know about the metal rod, there was no evidence of premeditation. (R 538) (Note- the authorities did not learn of the metal rod until Omer told them after his plea bargain, R 540).

Maintenance shop supervisor Carl Hicks testified that he was making a phone call at approximately 3:05 p.m. on June 20, 1985 at the front of the shop when he saw Robertson standing under an oak tree in front of the shop. (R 400-401) Robertson had a cast on his arm; Robertson did not work for Hicks and Hicks thought it unusual for Robertson to be standing there. (R 402-404) Hicks was told by Marvin Harris that Drew was hurt; Hicks found Drew outside the building bleeding badly. (R 404-405)

Vocational instructor James Chavous testified that as he was entering the gate to the maintenance yard on June 20, 1985, Appellant passed by him with red, wet looking pants. (R 430) Inmate Marvin Harris, a tool room clerk in the welding shop, testified that when he went to fill the coffeepot he saw Appellant, Chickenhead Robertson and Omer Williamson, and that Appellant asked him to ask Drew to come outside. (R 466-467) After Drew went outside, Harris looked out the window and saw Appellant stabbing Drew. (R 469) A few minutes later Harris saw Appellant and Chickenhead walking down the road towards the gate and noticed that Appellant had blood on his right hand.

(R 470) Harris found Drew up against the wall behind the air compressor. (R 470)

Inmate Kenneth Baez testified that Appellant asked him, before lunchtime and prior to the murder, if he had "a shank- I want to kill the son of a bitch". (R 600) Baez explained that 'shank' means a knife. (R 600)

Inmate Ronnie Presley testified that he saw Appellant and Omer Williamson behind the maintenance building, that Appellant appeared to be hitting Drew. (R 610-611) Presley saw Appellant in front of C dorm, covered with blood. (R 611) Appellant told Presley that "I wanted to get away with this, but there ain't no way that I can now". (R 612) At the laundry, Appellant told Presley that the son of a bitch wouldn't die. (R 612) Presley said Chickenhead Robertson walked up at that time and Presley saw the knife on Robertson, underneath his shirt. (R 613) Presley testified that Chickenhead put the knife in his cast. (R 613)

Inmate Mark Bishop testified that Appellant and Robertson asked him on the morning of the murder where they could get a knife. (R 621) Bishop saw Appellant and Robertson later coming down the road from the maintenance building looking scared, and Appellant had blood on him. (R 624) In the laundry, Appellant told Bishop that he "killed that motherfucker". (R 627) Bishop

and Robertson took the knife and buried it underneath an old oak tree. (R 629-630) Robertson told Bishop that he had gone along to be the lookout (R 630-631), that he knew there was going to be a confrontation about collecting money, but that he didn't know anyone was going to be hurt. (R 630-633) Robertson told Bishop that he was acting as the lookout, he heard a scream and he looked and saw Omer holding Drew with Appellant stabbing Drew. (R 635)

Correctional Officer Wade Higginbotham searched Appellant's room and locker and found a bloodstained towel, a tee shirt with bloodstains, and his shoes with blood stains. (R 649, 652-653)

Appellant did not testify during his trial. Appellant did testify in the sentencing phase, but not in the guilt phase. Appellant called Michael Thompson, who testified that Omer Williamson said he was going to 'fix Appellant's ass for calling him a child molester'. (R 723)

During the sentencing phase, the state presented testimony as to Appellant's current conviction for armed robbery. (R 862-863) Appellant presented his own testimony, to the effect that he killed Drew in self-defense. (R 895-896) Appellant admitted killing Drew, but denied it was premeditated. (R 906, 916).

In sentencing Appellant to death based upon the jury's recommendation of death, the trial jduge made the following written findings in support of his determination of three ag-

gravating circumstances and no mitigating circumstances:

> As to aggravating circumstance (5)(a), the Court finds that the capital felony was committed while the defendant was under sentence of imprisonment. The evidence produced at the sentencing stage showed that the defendant had previously been convicted of armed robbery in 1984 and was serving a 9-year sentence for that offense.
>
> As to aggravating circumstance (5)(b), the Court finds that the defendant was previously convicted of a felony involving the use or threat of violence to the person of another. The evidence showed that the defendant had previously been convicted of armed robbery.
>
> As to aggravating circumstance (5)(i), the Court finds that the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner. The defendant had not even a pretense of justification for murdering the decedent. The defendant testified on his own behalf at the sentencing phase and admitted stabbing the decedent multiple times. The evidence was conclusive that the defendant was the primary leader in planning the murder, securing a weapon, and personally committing the murderous act. Although he denied having the brass rod, the evidence is clear that he took it with him for the sole purpose of committing the murder. After the murder, the defendant meticulously sought to conceal evidence and impede the investigation. The "cold" manner of the murder was further evidenced by the defendant's statements in effect reflecting that he was disappointed that it took so much effort to kill the decedent. Later statements to Omer James Williamson, reflected that the defendant was very aware that the state needed sufficient evidence of premeditation in order to convict for first degree murder, and that an absence of the weapons available to the prosecution as evidence, particularly the brass rod, would be helpful to his case.

The pathologist testified that the body of the decedent contained several marks made by a blunt instrument, which supported the testimony of Omer James Williamson that the defendant had unsuccessfully tried to stab the defendant with the brass rod.

In summary, the defendant committed a murder for no reason at all; his only explanation suggested that he didn't know why he had done it. But it is unequivocally clear that he planned the murder and executed it with precision, according to the plan. This murder is best put in proper perspective, by the observation that this homicide so offended even the inmates at Cross City Correctional Institution, that several broke the "code of silence", testified for the state at the trial concerning what they had witnessed, and thereby risked their own personal safety thereafter in the prison system.

SUMMARY OF ARGUMENT

The court did not err in denying Appellant's motion for mistrial made in response to the prosecutor's closing argument, as the argument was a proper comment on the evidence in rebuttal to defense counsel's assertions that the crime was merely manslaughter. The court did not abuse its discretion in denying the motion for mistrial.

The court did not err in sentencing Appellant to death. That Omer Williamson allegedly received a life sentence does not invalidate Appellant's death sentence, as the jury was fully aware of the terms of Omer Williamson's plea bargain. Appellant did not present evidence of Omer's life sentence as mitigating evidence in the sentencing phase of the trial; but the jury was aware of Omer's deal.

The court did not err in finding the aggravating circumstance that the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. The evidence was sufficient to show heightened premeditation and advance planning on the part of Appellant. In short, this murder was a prison execution over a $15 drug debt, planned well in advance by Appellant.

I

WHETHER THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL AS TO THE STATE'S CLOSING ARGUMENT CONCERNING CO-DEFENDANT OMER WILLIAMSON'S PLEA OF GUILTY TO FIRST-DEGREE MURDER

During the state's first closing argument, counsel for the state, in reviewing the evidence for the jury, emphasized the testimony of eyewitnesses to the first-degree murder and evidence of premeditation:

> What other evidence do we have of premeditation? Ah-ha, Mr. McKeever would lead you to believe, in his opening statement, that there was no other evidence of premeditation other than the testimony of Omer Williamson, who he painted this horrible picture of as a child abuser, a homosexual, and all of that. Well, those things pale in comparison to murder. The worst thing about Omer Williamson is, he is a murderer. He is a killer. He pled guilty to that. Johnny Williamson is a murderer, and is a killer. He is the one who actually did the killing.
>
> . . . .
>
> Defense Exhibit 5 was introduced. Now, we didn't object when this was introduced. And I want you to go back and look at this. I want you to take a look at this. What is it that Omer Williamson pled guilty to? Murder in the first degree and possession of contraband in prison, as charged.

(R 734)

Defense counsel in closing argument argued there was no pre-

meditation and that it was self-defense. Defense counsel, in attacking Omer Williamson's credibility, argued in detail the plea bargain and that Omer was fabricating the 'plan' in order to hang Appellant:

> Now, if we don't have premeditation, folks, nobody faces the chance of the death penalty. We don't have to go through that phase of the trial. The only person--and I'm not misleading anybody, and I'm not making promises I can't live up to--the only sole human being witness who told you about a plan was Omer James Williamson. We can almost turn to the court reporter and say, "read it back". There is no plan without Omer James Williamson telling you there is a plan. Well, I think there was a plan, and we'll talk about the plan.
>
> . . . .
>
> It's not automatic murder in the first degree. That's your decision from the facts.

(R 751)

> . . . .
>
> So he decided that he would kill or "take out", in his wonderful language, Alabama. This is a one-sight heavier situation for Omer James Williamson than $15. He is facing the death penalty and having to sit at that table and have a lawyer argue to you not to consider the death penalty. Fifteen bucks was worth taking somebody out, wasn't it? Well, what do you think he is doing in this situation? He is taking out these two guys so that he has got protection, and a deal. And what a sweetheart deal.
>
> Not their fault again, but he knows what they think is the truth. And all he has to do is tell that story, and he has got his deal. They are so confident in it, they are so happy with it before trial, that he doesn't even have to take a polygraph. Just part of the deal. If they didn't believe him, "you got to

> take a polygraph." Did he do that? So he gets his deal, and plans his killing, and here we sit. All you have got to do is suggest the death penalty, and his deal goes clickity-clack down the track. He's got them both dead, and he]s got his $15, and his time in prison as a protected inmate. A sweetheart deal. And we're supposed to rely on his testimony.

(R 764)

In rebuttal closing argument, the state argued that if the jury convicted Appellant of anything less than first degree murder, then Appellant would receive a sentence lighter than Omer Jones Williamson: (R 773)

> Now, anything less than first-degree murder, and he is going to serve less--or he will receive less than Omer Williamson. Now, Mr. McKeever says that's a sweetheart deal, a sweetheart deal. Yessiree. I can just see this now. He is sitting in his cell, and he say's "Yeah, I'm going to really fix that Alabama. I'm going to really fix him. I'm going to plead straight up to murder I. I'm going to plead guilty as charged to murder I and possession of contraband. Yeah, that ought to show Alabama, huh? I'm going to lie."

(R 773)

Next came the closing argument sequence as to co-defendant Robertson. Robertson's counsel argued that although Roberston acted as a lookout, he did not know anything about a murder being planned, and that Omer's statement that Robertson knew beforehand that Drew was to be killed is not a reliable statement. (R 795-797) In attempting to discredit Omer, Robertson's counsel (Slaughter) argued:

> Like Mr. McKeever pointed out to you, before he had to tell anybody his version of the facts, he had the opportunity to hear the state tell the judge at the time his plea was taken what the state's version of the facts in this case would be. He had a preview.
>
> Now, it's time that this man has come in and he has pled guilty as charged. He has pled guilty to murder in the first degree. That's pretty heavy. I agree with that. So what possible benefit is he getting out of it? What possible benefit is this man getting from cutting his deal with the State of Florida? Well, what he is doing is keeping himself from frying in the electric chair. It's very simple. And that is a very strong motive, folks. That's a pretty strong motive for coming forward and testifying. That's a pretty motive for doing just about anything. It's called self-preservation.

(R 797-798)

The state then argued that if it was only manslaughter in that Robertson didn't know there was going to be a killing, then Omer's testimony as to premeditation would be false and thus why would Omer plead guilty to first degree murder if he wasn't telling the truth as to premeditation. (R 807) Appellant's defense counsel objected and moved for mistrial on the basis that "the obvious inference from his statements is that in light of the co-defendant's plea to the charge these defendants must also be guilty of the charge." (R 807)

The proper standard of review is whether the court erred in denying the motion for mistrial. A ruling on a motion for mistrial is within the sound discretion of the trial court; a motion

for mistrial should only be granted in cases of absolute legal necessity. Salvatore v. State, 366 So.2d 745 (Fla. 1978) cert. den. 444 U.S. 885 (1979); Wilson v. State, 436 So.2d 908 (Fla. 1983); Flowers v. State, 351 So.2d 764 (Fla. 3rd DCA 1977). The granting of a mistrial should be only for a specified fundamental or prejudicial error which has been committed in the trial of such a nature as will vitiate the result. Perry v. State, 200 So. 525 (Fla. 1941). If the alleged error does no substantial harm and causes no material prejudice, a mistrial should not be declared. Id.

The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Bertolotti v. State, 476 So.2d 130 (Fla. 1985). Wide latitude is permitted in arguing to a jury. Thomas v. State, 326 So.2d 413 (Fla. 1975); Spencer v. State, 133 So.2d 729 (Fla. 1961) cert. denied 369 U.S. 880 (1962). Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments. Spencer, supra. The control of counsel's comments is within the trial court's discretion, and an appellate court will not interfere unless an abuse of discretion is shown. Breedlove v. State, 413 So.2d 1 (Fla. 1982), cert. den. 103 S.Ct. 184; Thomas, supra; Paramore v. State, 229 So.2d 855 (Fla. 1969) modified, 408 U.S. 935 (1972).

The statements complained of are not a clear abuse of discretion, and nor do they rise to the magnitude of a denial of

fundamental fairness. See Bush v. State, 461 So.2d 936 (Fla. 1984), and Teffeteller v. State, 439 So.2d 840 (Fla. 1983). The comments were not of such a nature so as to poison the minds of the jurors or to prejudice them so that a fair and impartial verdict could not be rendered; they did not materially contribute to Appellant's conviction and were not so harmful or fundamentally tainted so as to require a new trial; they were not so inflammatory that they might have influenced the jury to reach a more severe verdict of guilt then it would have otherwise. Blair v. State, 406 So.2d 1103 (Fla. 1981) and cases cited therein at 1107. This court will not presume that jurors are led astray, to wrongful verdicts, by the impassioned eloquence and illogical pathos of counsel. Paramore, supra.

In determining whether the comments could constitute prejudicial error, the comments must be examined within the context of the trial to determine whether the prosecutor's behavior amounted to prejudicial error-the court must consider the probable effect the comments would have on the jury's ability to judge the evidence fairly. United States v. Young, __U.S.__, 36 Cr.L. 3143 (1985). In Young the court recognized that it should come as no surprise that in the heat of argument, counsel do occasionally make remarks that are not justified by the testimony, and which are, or may be, prejudicial to the accused. Id.

The jury heard Omer Williamson testify that he plead guilty

to first degree murder, not manslaughter. The obvious inference is that a first degree murder was committed, not a manslaughter. The prosecutor was simply commenting on the evidence presented to the jury by pointing out an obvious inference in rebuttal to Robertson's defense counsel's argument that only a manslaughter was committed. There is no unfair prejudicial impact constituting reversible error, especially since the defense concentrated on attempting to destroy Omer Williamson's credibility by arguing that his plea bargain-"sweetheart" deal was based on untrue testimony as to premeditation. If there was any error, such error was harmless as there was overwhelming evidence of guilt emanating from witnesses other than Omer Williamson.

II

THE COURT DID NOT ERR IN SENTENCING WILLIAMSON TO DEATH WHEN HIS CO-DEFENDANT, OMER WILLIAMSON, RECEIVED A LIFE SENTENCE

Appellant claims the court erred in sentencing him to death while co-defendant Omer Williamson only received a life sentence. Appellant argues that Omer Williamson is equally culpable.

Appellee disagrees with Appellant's characterization of the evidence. It is clear that Appellant was the dominant actor, as Appellant is the person who first suggested killing the victim. (R 510) Appellant is the person who formulated the plan (R 511) and initiated the acts toward acquiring the weapon. (R 512) Appellant repeatedly told other inmates that they were going to kill the victim (R 515), and recruited Robertson to act as the lookout. (R 519) Appellant did the actual killing, stabbing the victim with the knife and with the rod. (R 525-527) Appellant 'came up' with a story for Omer Williamson to use in order to 'beat' any first degree murder charge. (R 536-537) Appellant was the leader, with Williamson and Robertson following him. (R 536) As to Omer Williamson's role in the murder, he was simply an accomplice who followed Appellant's plan; he held the victim while Appellant murdered the victim. The jury and judge believed Omer Williamson's testimony. The

evidence clearly establishes that Appellant was the dominant actor in the entire criminal episode. This court has consistently approved the imposition of the death sentence when the circumstances indicate that the defendant was the dominating force behind the homicide, even though the defendant's accomplice received a life sentence for participation in the same crime. Marek v. State, 492 So.2d 1055 (Fla. 1986), Bolender v. State, 422 So.2d 833 (Fla. 1982); Jackson v. State, 366 So.2d 752 (Fla. 1978) cert. den. 444 U.S. 885; White v. State, 415 So.2d 719 (Fla. 1982) cert. den. 103 S.Ct. 474. It is permissible to impose different sentences on capital co-defendants whose various degrees of participation and culpability are different from one another. Hoffman v. State, 474 So.2d 1178 (Fla. 1985).

The sentence of an accomplice may affect the imposition of a death sentence, depending upon the circumstances. Gafford v. State, 387 So.2d 333 (Fla. 1980); Salvatore v. State, 366 So.2d 745 (Fla. 1978); Smith v. State, 365 So.2d 704 (Fla. 1978). However, the exercise of prosecutorial discretion in granting immunity to a less culpable accomplice, co-conspirator, or aider and abettor does not render invalid the imposition of an otherwise appropriate death sentence. Hoffman, supra; Palmes v. Wainwright, 460 So.2d 362 (Fla. 1984); Downs v. State, 386 So.2d 788 (Fla.) cert. den. 449 U.S. 976 (1980). Here, Omer Williamson agreed to plead guilty as charged and testify truth-

fully in exchange for a state recommendation of life, and 'protection' in prison. In Brown v. State, 473 So.2d 1260 (Fla. 1985) this Court was faced with a similar situation wherein the accomplice received a life sentence after pleading guilty to second degree murder and agreeing to testify at Brown's trial. This court explained

> The evidence introduced at trial showed that Appellant was the leader whose role in the murder was more significant than those of his accomplices. Dudley's participation was minor compared to Appellant's. Moreover, Dudley's plea, sentence, and agreement to testify for the state were products of prosecutorial discretion and negotiation. See Profitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); Witt v. State, 342 So.2d 497 (Fla.) cert. den. 434 U.S. 935, 98 S.Ct. 422, 54 L.Ed.2d 294 (1977). We do not find any infirmity in Appellant's sentence based on the unequal fate of Dudley.

473 So.2d at 1268-1269.

The jury was aware of Omer Williamson's conditional plea of guilty and possible life sentence throughout the trial and during sentencing. (R 539, 559) Omer Williamson had not been sentenced at the time of Appellant's trial or sentencing; Omer Williamson's plea bargain contained the proviso that he testify truthfully, something that could not be determined until after trial. As such, there was no evidence per se before the jury as to Omer Williamson's sentence, as he had not yet been sen-

tenced. However, as stated earlier, the jury was well aware of the terms of Omer Williamson's conditional plea. (R 539, 559; and Defense Exhibit 5, R 577)

At the sentencing hearing the state admitted into evidence everything that happened at trial, and produced two witnesses who testified as to Appellant's prior conviction for which he was incarcerated at the time of the present offense. The defense presented the testimony of Appellant (in which Appellant admitted killing the victim) and the testimony of a prison official as to the effect of a life sentence on Appellant. Defense counsel asked for instructions on the mitigating circumstances concerning whether the victim was a participant in the defendant's conduct or consented to the act (§921.141(6)(c) Fla. Stat.) and any other aspect of the defendant's character or record and any other circumstance of the offense. (R 930-931, 946) Defense counsel never mentioned the unimposed life sentence to be received by Omer Williamson, nor did defense counsel introduce any evidence concerning 'equal culpability'.

The jury was aware that Omer Williamson would probably receive a life sentence and the reasons therefor, yet the jury still recommended and the trial judge imposed a sentence of death. They reached this result because the death sentence is clearly appropriate regardless of what happens to Omer Williamson.

Simply because the state conditionally accepts a guilty plea from an equally guilty accomplice does not mean that as a matter of law, the Appellant could not receive the death sentence. Bassett v. State, 449 So.2d 803 (Fla. 1984). Here, Appellant never proffered evidence of Omer Williamson's 'sentence'. In Armstrong v. State, 399 So.2d 953 (Fla. 1981) this court found no error under Messer v. State, 330 So.2d 137 (Fla. 1976) where the defendant did not proffer any evidence as to the co-defendant's 'sentence'. Although any evidence reasonably related to a valid mitigating consideration should, when proffered by the defendant, be admitted into evidence at the sentencing phase of a capital trial, when the defense fails to proffer such evidence and the jury is fully aware of such evidence, having learned it during trial, there can be no prejudicial error. The jury is presumed to have considered Omer Williamson's 'sweetheart deal' when deciding his credibility, and the jury is presumed to have considered Omer's life sentence when recommending death for Appellant. There is no harmful error.

III

THE COURT DID NOT ERR IN FINDING THAT APPELLANT COMMITTED THIS MURDER IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION

Appellant argues the trial court erred in finding this aggravating circumstance because there was a pretense of justification for the murder, as Appellant "murdered Drew because if he did not, Drew would have killed Omer Williamson and perhaps himself for not repaying a $15 drug debt Omer Williamson owed to Drew," (Appellant's brief, p. 18) and because when Appellant confronted Drew, Drew kept his hand in his pocket, an act which worried Appellant because it was unnatural and merited watching (based on Appellant's testimony at his sentencing hearing).

There was no evidence (except Appellant's testimony at sentencing) that Drew ever even thought about killing Omer Williamson for nonpayment of the $15 debt. Once Omer Williamson stated he was going to fight Drew, Appellant told Omer that 'Drew would stab Omer, and that was why they needed to kill Drew'. This conclusion was based on the premise that Drew was a 'country boy', and fighting him would probably be fatal to the aggressor. Appellant, after deciding that killing Drew was necessary, then carefully formulated a plan and took multiple steps towards acquiring two weapons. These events occured days

before and the day of the murder. The evidence clearly shows heightened premeditation sufficient to support a finding that the crime was committed in a cold, calculated and premeditated manner. Simply put, the murder of Drew was a prison execution over a $15 drug debt.

This court has held that the "cold, calculated and premeditated component of this aggravating circumstance requires heightened premeditation, something in the perpetrator's state of mind beyond the specific intent required to prove premeditation. Brown v. State, supra; Jent v. State, 408 So.2d 1024 (Fla. 1981) cert. den. 457 U.S. 1111. Heightened premeditation and advance planning are the kinds of factors that properly bear on the "cold, calculated" circumstance. Brown, at 1268. Appellant didn't just merely decide to kill Drew; Appellant carefully thought out a detailed plan which included a lookout (Robertson) and a defense formulated prior to the murder (the placing of the $5 bill in Drew's pockets so the authorities would believe their self-defense theory and not believe the murder was committed for robbery). The evidence demonstrates that Appellant's state of mind was such as to support the finding of this aggravating circumstance. See Rose v. State, 472 So.2d 1155 (Fla. 1985); Lara v. State, 464 So.2d 1173 (Fla. 1983); Mills v. State, 462 So.2d 1057 (Fla. 1985); Troedel v. State, 462 So.2d 392 (Fla. 1984); Routly v. State, 440 So.2d 1257 (Fla. 1983).

Appellant's contention that there was a pretense of moral or legal justification for the killing is simply not supported by the evidence. There was no evidence, for example, that Drew planned to collect the $15 by force-in fact, the evidence showed that Drew was a friend or 'partner' of Appellant and Omer Williamson.

The court did not err in finding this aggravating circumstance.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been forwarded by hand delivery to David A. Davis, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, on this 7th day of January, 1987.

ANDREA SMITH HILLYER
ASSISTANT ATTORNEY GENERAL