IN THE SUPREME COURT OF FLORIDA

WILBURN AARON LAMB,

Appellant,

v. CASE NO. 70,369

STATE OF FLORIDA,

Appellee.

_____/

ANSWER BRIEF OF APPELLEE

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TOPICAL INDEX

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OTHER AUTHORITIES

STATEMENT OF FACTS

Guilt Phase

Appellee adds the following facts not featured in appellant's brief: Marie Atkinson, the victim's girlfriend, testified that when she went into the apartment the door had been forced open, the premises were a shambles, and the victim's possessions were piled up (R 274). She also testified about the two gold hammers which were owned by the victim (R 278). The victim's son, Roger Eberenz, who was also with Marie Atkinson at the time the victim's body was discovered, corroborated that testimony and indicated his father owned two gold hammers. He had owned them for years. They were awards. Both hammers were about the same size and weight, and the witness identified one of the hammers which had been recovered (R 420). Roger also identified the custom made gold ring which belonged to the victim and which was found in the possession of appellant (R 421). He also identified a necklace that was stolen from the victim. He indicated that his father kept the jewelry, including the ring that was recovered from appellant, on a nail which was inside his closet (R 431-432, 452).

The medical examiner testified that the victim's head, face, shirt and pants were fully covered with dry blood (R 296-297). There were three irregular wounds in the right-mid-forehead area (R 298). The opening of some of the wounds had some brain fragments (R 299). The wounds were made by a rounded-contoured weapon and not a sharp instrument (R 299). There was some hemorrhage of the three forehead wounds (R 300). There was a large fracture of the skull underneath the three forehead wounds creating a big continuous hole. There was some fragments of bone embedded in the underlying brain tissue with some hemorrhage on the left side of the skull (R 302). In addition to the wounds on the head, the medical examiner noted some swelling

of the victim's hand (R 308). The doctor testified that heavy force was used and that the hand swelling would be indicative of a defensive wound (R 311). The head wounds were characterized as massive severe trauma (R 314).

An ax handle was found around the victim's premises (R 372). It had red stains on it (R 409). The serologist determined that the stain was the victim's blood (R 935, 950). In addition, many footprints were recovered from the scene and memorialized (R 375-376). Some of these footprints inside could be clearly seen (R 383). Some of these shoe impressions were photographed and others were made into casts (R 471, 473-474, 476). A number of such pictures were taken in the laundry area in the victim's apartment (R 481). There was also a shoe print which was recovered from a poster in the victim's apartment (R 482). In addition, a calendar bearing shoe impressions was found lying on the floor in the office area of the victim's apartment (R 908-909). Officer Cockriel also took photographs at the motel where Mary Holscher, the co-defendant, and appellant were living at the time of the crime (R 552). Some of the jewelry taken from the victim was photographed in this motel room (R 553).

Additional pictures were taken in the victim's apartment. The jury was shown a picture of a microwave oven with the door open and a bowl of soup inside (R 589-590).

Mary Holscher, appellant's girlfriend at the time of the crimes, testified that on the night of the offense appellant was wearing hightop Pony tennis shoes and the co-defendant was wearing desert boots when they left to burglarize the victim's apartment and kill him (R 651). When they returned, appellant had a man's large gold nugget diamond ring and was wearing a gold chain (R 652). Appellant's tennis shoes were bloody, which they had not been before he left the hotel room (R 652). In addition, the two men also had cash

(R 653).

When appellant related the circumstances of the burglary and murder to Mary, he indicated that the jewelry was taken from inside a closet (R 659). The ring that Mary indicated that appellant took from the apartment was in his pocket (R 665). On cross-examination, Mary explained that she asked appellant, rather than the co-defendant, about the jewelry because she was closer to appellant at that time (R 674). She did not notice any blood on the co-defendant's clothes (R 674). She explained that appellant and the co-defendant left in an old Camaro automobile at the time of the burglary. This car belonged to Frank Clauser (R 676). She also indicated that there was an ax handle inside Frank's car (R 683-684). Appellant told her that he and co-defendant each wore a sock and a glove on their hands at the time of the offenses (R 698). Appellant's clothing (as well as the co-defendant's clothing) was recovered and placed into evidence (R 706). Some of the jewelry as well as the appellant's tennis shoes were recovered from the motel room where he, Mary, and the co-defendant were living (R 721-725). In addition, the co-defendant's desert boots were recovered (R 726-727).

Frank Clauser testified and corroborated Mary's testimony that the appellant and co-defendant borrowed his 1971 Camaro on the night of the burglary and murder (R 747, 751, 752).

Lieutenant Fair was present when the appellant was arrested and saw a gold necklace around appellant's neck (R 865). Deputy Tamillo was also present at the arrest, searched the vehicle that appellant was driving, and recovered other jewelry (R 815-816). He also recovered the victim's wallet from a creek (R 833, 835). The wallet was found under water, but credit cards were floating on top of the water (R 840). The co-defendant directed the police to this creek (R 841).

Deputy McCormick was also at the arrest scene on January 22 and saw appellant driving the gray Camaro which belonged to Frank Clauser (R 847). He found the victim's gold-custom made ring in the appellant's pocket (R 848).

After appellant's rights had been explained to him, Deputy McCormick heard him admit that he and the co-defendant had been planning for a few months to rob the victim because the co-defendant had worked there and the victim had money. Appellant stated they went up the back stairs and found the apartment already ransacked and the victim dead. The deputy then asked appellant if they had been burglarizing the apartment and if the victim had come home unexpectedly. The appellant said, "That's exactly what happened." (R 854).

Tim Kaye, a contemporary and acquaintance of the co-defendant's and appellant's, testified that he saw blood on appellant's shoes (R 864). Appellant explained to him that he had to kill the victim's dog (R 864). He also saw the victim's ring which was recovered from appellant (R 866). He heard, on prior occasions, the co-defendant and appellant talking about burglarizing or robbing the victim (R 890).

The serologist testified that the two brown suede shoes which belonged to the co-defendant did not have blood on them (R 931). Some of the gloves and socks recovered did have the victim's blood on them (R 935, 958). She confirmed that there was blood on appellant's tennis shoes (R 938-939, 959).

Appellant had a number of witnesses testify on his behalf, basically for the proposition that Mary Holscher was allegedly untruthful. Paul Hartsock, one of these witnesses, corroborated Mary's testimony to the extent that he saw appellant on the date of the arrest and appellant had the big nugget ring which belonged to the victim (R 1014). He also admitted that he and appellant were good friends and that he had called appellant between thirty and forty

times since appellant had been arrested (R 1019). Sandra Allen, another one of these character witnesses, testified that she was in the group of friends which included the co-defendant and appellant (R 1021). Still another character witness, David Clauser, also admitted that he talked to appellant two times after he had been arrested (R 1029, 1034). Stacey Stuckert, another witness who claimed Mary Holscher was untruthful, was impeached because her deposition revealed that she did not know of Mary's reputation for truthfulness or untruthfullness (R 1038, 1041-1042). She had visited appellant a number of times after he had been arrested and had developed "feelings" about him. She was hoping that they would have a relationship after appellant was released from jail (R 1046-1047). Likewise, it was revealed that another character witness knew appellant a long time and was good friends with him and would sometimes contact appellant while he was in jail (R 1050, 1054).

Appellant testified. He admitted that initially he planned to steal cocaine and marijuana from the victim's premises (R 1065). He looked for these drugs only downstairs while the co-defendant went upstairs (R 1065). He claimed that neither he nor the co-defendant had brought an ax handle to the scene (R 1066). His story was that he only intended to enter the garage area and not the residence (R 1069). Appellant eventually did go upstairs and saw the co-defendant next to the refrigerator, crying. The co-defendant allegedly stated he killed the victim and appellant saw the body (R 1071-1073). The co-defendant dropped the stolen jewelry but appellant claimed, "We scooped it up." (R 1075) As the perpetrators were leaving, the co-defendant reminded appellant to retrieve a necklace that was hanging on a nail in a closet (R 1076). Appellant attempted to explain the blood on his tennis shoes by telling the jury he checked the pulse of the victim (R 1078). He also claimed

that the co-defendant gave him the victim's ring (R 1078).

He attempted to account for the explanation he had given to Deputy McCormick by stating that he was "covering up" for the co-defendant (R 1081). The serologist, while testifying for the state, indicated that the blue sweatshirt that appellant was wearing at the time of the arrest contained blood (R 936-937). It was appellant's contention that the co-defendant had been wearing that sweatshirt. Appellant attempted to explain this discrepancy by indicating that he found the shirt in the back of Frank Clauser's car and put it on after the offenses occurred (R 1081). Appellant conveniently forgot the conversation that Tim Kaye overheard about planning the robbery and hitting the victim over the head with a rubber mallet (R 870, 1083). At trial, appellant claimed he talked about burglarizing the victim's apartment only on the day before it happened, contrary to what he told Deputy McCormick (R 854, 1086). Appellant did admit the story about getting blood on his shoes when he killed the dog was a lie. He also admitted that he lied to Deputy McCormick when he told him that he and the co-defendant went into the victim's apartment and found the victim already dead (R 1097). Appellant maintained that when he initially committed the burglary, he did not intend to go upstairs to the victim's living area, even if he thought the drugs would be upstairs (R 1100). He also noticed no food or soup being cooked in the victim's apartment (R 1100). He did admit that he took Mary out to the ditch where the wallet was eventually found (R 1103).

On rebuttal, Deputy Cockriel testified that there were no visible footprints in the downstairs area where appellant claimed he was (R 1155-1156). Previously, the victim's son had testified that he saw no appearance of ransacking downstairs (R 457).

Penalty Phase

The co-defendant, Bruce Haskell, age nineteen, was the first witness to testify (R 1316-1317). He received a seventeen year sentence pursuant to a plea to second degree murder, burglary and grand theft in exchange for his testimony (R 1318).

Before the homicide, he was employed by the victim (R 1319). Haskell had numerous conversations with appellant about robbing the victim (R 1325-1326). The plan was that appellant was to knock the victim out with a stick and take his wallet (R 1326). One week before the actual homicide, both the perpetrators went to the victim's business (the victim's apartment was located above his business) and waited for him to come down from his apartment. The victim did not leave his apartment, so after about fifteen or twenty minutes the two youths left (R 1326-1327, 1329). At that time, however, appellant retrieved an ax handle from the victim's business (R 1328). Appellant declared he would use the ax handle to hit the victim (R 1329). Haskell indicated that the two returned to the business a number of times before the actual homicide occurred (R 1330).

On the night of the homicide, Haskell indicated that he tried to "jimmy" the door with a tire iron. When his efforts proved unsuccessful, appellant tried and succeeded (R 1334). The co-defendant indicated that he was not directing appellant. In fact, appellant told the witness to watch from the window to see if the victim was coming home (R 1335). Haskell indicated that at that time he and the appellant were wearing socks on their hands (R 1337). The two were unsuccessful in locating narcotics. Appellant then rejected Haskell's offer to leave declaring that he wanted to wait for the victim to come home so he could get his wallet. Appellant then made some soup (R 1338). The co-defendant saw some headlights, and so indicated to appellant. Appellant shut off the lights. He took the ax handle and then

declared it was too long. The witness told appellant not to strike the victim with the weapon but appellant told Haskell to hide. The co-defendant complied (R 1339).

Haskell heard appellant hit the victim two or three times. Appellant had the hammer in his hands. The victim fell but was still moaning (R 1341). Haskell saw the victim roll his head from side to side. Appellant explained that he could not use the ax handle because it was too long and would hit the ceiling so he had to use the hammer. Then Haskell saw appellant pull the victim's feet and the victim fell; the victim was still moaning (R 1342). Appellant kicked him in the face and he stopped moaning (R 1342). As the two were leaving, appellant obtained the victim's wallet (R 1342-1343).

After the two left the crime scene, the witness suggested that they call an ambulance for the victim. Appellant rejected this idea because of the possibility that their voices could be recorded and traced (R 1344). Haskell was with appellant when he saw appellant throw the victim's wallet in a ditch (R 1345).

The defense called appellant's mother to testify (R 1374). Although appellant was born about two months prematurely, there were no medical difficulties other than his being small and a little slow (R 1375, 1377). In fact, appellant did quite well in school until the sixth grade. His teachers indicated that he could have done a lot better (R 1379). He dropped out of school in the eighth grade (R 1381). His mother believed that he used a lot of drugs, especially marijuana, starting in about 1984 (R 1388-1389). He was sent to a rehabilitation center called Horizon House to be treated for depression and not necessarily for a drug problem (R 1393).

Appellant owned his own car, wrecked two months before the murder (R 1396-1397). Appellant had been able to work and earn money to purchase this

car (R 1397-1398). Mrs. Lamb indicated that she and her husband provided a good home for appellant. Appellant was living in Orlando outside of the home for about six weeks prior to the murder (R 1399).

Leo Lescarbeau testified that his son and appellant were friends (R 1401-1402). The two participated in a scouting troop known as the Explorers (R 1402). Appellant was a leader; the other youths in the group followed him (R 1404). Appellant was able to help the witness and his son reconcile after an argument (R 1406).

Appellant's sister testified that he was mature for his age but not an adult (R 1421). Although the witness indicated she was an abused child, she said that her mother never struck the appellant (R 1424). She testified that she, her mother, and grandmother had "spoiled" the appellant (R 1425).

Appellant's brother, William, testified that he (William) left home about age seventeen. He owned his own apartment and paid bills (R 1454, 1462). He believed appellant could do the same. He informed the jury that appellant had held a job (R 1462).

Doctor Whitacre, a clinical psychologist, interviewed appellant in January of 1985 after he was released from the Horizon House (R 1480). The doctor explained that marijuana did not affect appellant's reality testing (R 1488-1489). The diagnosis of appellant was a disorder of an under-socialized aggressive nature (R 1494). (Later, the doctor testified that there would have to be a five year pattern established to classify one as having an anti-social personality disorder, which was the eventual diagnosis of appellant (R 1545)). Such a behavioral disorder was learned and not genetic (R 1495, 1525). Appellant seemed insightful but was really manipulative (R 1499-1500). Doctor Whitacre acknowledged that Doctor Cole had diagnosed appellant as having a depressive disorder, but the witness believed

the latter was not "diagnostic" (R 1503-1504).

Doctor Whitacre indicated that appellant was concerned but not upset about his sick nephew (R 1506) (In November of 1985, appellant found out that his younger nephew had leukemia (R 1775)). The doctor found no underlying mental illness (R 1511-1512). Although appellant was situationally agitated he was not significantly depressed at the time Doctor Whitacre was seeing him (R 1517). The diagnosis of an anti-social personality disorder was fairly common, but there was not a lot of success in treatment by behavior modification (R 1520, 1527-1528).

On cross-examination, the doctor indicated that his report classified appellant as having an anti-social personality disorder. The problem commenced about age fifteen. The characteristics of this disorder included the failure to sustain jobs, lying, stealing, fighting, truancy, resisting authority, and could include substance abuse (R 1536). A person with this type of disorder could conform to the law but with more difficulty than the average person. A person with such a personality description would have a lack of conscience. He lacked the ability to empathize with others (R 1538). Appellant was not acting under duress or substantial domination of another at the time of the crime, nor was he easily intimidated or influenced (R 1540-1541).

The doctor indicated there was a distinction between a chronological and a psychological age. His opinion was that appellant functioned as an adult on a psychological level. He explained:

> I think his history suggests that he has been living as an adult, perhaps, not in the practical sense of having his own place...but psychologically, he's very much been functioning as an adult for quite a while. I think Mr. Lamb grew up fast. I think he was into a lot of things at an early age, much more advanced than would be expected for someone his age.

Appellant's early childhood history would not necessarily be inconsistent with a diagnosis of an anti-social personality but the politeness could be a facade (R 1553-1554).

The defense presented the testimony of a fellow inmate incarcerated with the co-defendant, Arthur Beaulier (R 1561-1562). He asked the co-defendant if he "did it." The co-defendant replied in the affirmative (R 1571). The witness, however, explained that the co-defendant could have been showing bravado or bragging because the witness had informed the co-defendant about his long criminal history (R 1572). Beaulier also acknowledged that the co-defendant indicated he was not the one that swung the hammer (R 1593). The co-defendant dictated a letter to the witness which was sent to appellant. This letter indicated that had the co-defendant known appellant would beat the victim to death with the hammer, he would have tried to stop appellant (R 1594).

Various other friends and relatives testified for appellant. Peggy Osteen had a son who participated in the scouts with appellant (R 1632-1633). The witness considered appellant a friend and she would talk with appellant unlike the way she would talk with other children (R 1639). Joan Adache had a step-son who was also a friend of appellant's (R 1646-1647). Sometimes, appellant would visit with the witness and her husband even if her son were not home (R 1651, 1653-1654).

Doctor Cole, a child psychiatrist, treated appellant at the Horizon House (R 1705, 1709). Appellant was cooperative and admitted his drug problem (R 1710). Appellant, however, was suffering from a major depression (R 1713). The latter diagnosis did not mean that appellant was not in touch with reality (R 1714, 1728). A chemical brain imbalance caused this depression (R 1718-1719). Appellant, however, had improved greatly and was

not depressed when he was released from the treatment center (R 1724). Such a depression would fluctuate; it was not a personality characteristic and could be distinguished from an anti-social personality diagnosis (R 1729). Such a disorder went in cycles but a person over a period of time could improve (R 1734). Appellant was not lacking in intelligence (R 1732). Doctor Cole admitted that he had not seen appellant since December of 1984 and was unaware of appellant's cycle subsequent to that date. Nor could the doctor determine what appellant's cycle was at the time of the murder (R 1739, 1740). The doctor did not rule out the possibility that appellant was suffering from an anti-social personality disorder although he indicated that appellant had improved when he was discharged from the Horizon House (R 1746).

Next, appellant's father testified (R 1766-1767). He informed the jury about the nephew diagnosed as having leukemia (R 1775). Appellant, however, thought that the nephews (including the one that was sick) were "invaders" of his territory; appellant used to pick on them the way his brother Bill (William) had picked on him (R 1776).

SUMMARY OF ARGUMENT

POINT I - Whether the Imposition of the Death Penalty On A Juvenile Is Unconstitutional Per Se.

The Florida Legislature explicitly recognizes that some juvenile offenders have adult criminal propensities and that in some cases those juveniles may be executed. The United States Supreme Court mandates that the death penalty be imposed on an objective, individualized basis. Appellant's argument eschews the latter analysis and would have the death penalty overturned on the basis of mere chronological age, based upon generalities and not the specific circumstances of the case. Moreover, even if the United States Supreme Court in Thompson v. State, 724 P.2d 780 (Okla. Crim. Ap. 1986), cert. granted, 107 S.Ct. 1284 (1987), decides the issue in favor of that petitioner, such a decision would not apply in the case at bar because the appellant is two years older than Thompson. Hence, any decision in Thompson would not be a case in controversy vis-a-vis the facts in the case at bar. It is up to the state legislature to decide under what objective, particular circumstances the death penalty should be imposed. Since the United States Supreme Court looks to the legislatures for guidance in this area, and since a majority of the legislatures have voted to permit the imposition of the death penalty against juveniles, the latter factor militates against appellant's proposition. While deterrence and rehabilitation are factors to be considered, the mere fact that an offender is under age eighteen should not automatically imply that deterence would have no effect and that that person would be rehabilitated.

POINT II - Challenge to Trial Court's Finding of Aggravating Circumstances and Refusal to Find other Mitigating Circumstances.

The trial court was correct in finding the aggravating circumstance that the defendant was previously convicted of another capital felony, based upon

the instant offenses, because such a finding would not duplicate the other aggravating circumstance that the capital felony was committed while the appellant was engaged in a robbery. The aggravating circumstance under section 921.141(5)(d), Florida Statutes (1985) can be upheld on the basis that it involved a violent felony either entailing a burglary with an assault or a robbery. Moreover, even if this aggravating circumstance were stricken, this court can find that the capital felony was committed for pecuniary gain because the trial court indicated it would have found so, if it had not believed that such a finding would duplicate the finding under section 921.141(5)(d).

Two separate theories support the trial court's finding that the murder was calculated and premeditated. First of all, appellant had planned this homicide for weeks in advance and had armed himself with the murder weapon (an ax handle) at the time the burglary was committed. Moreover, the fact that the appellant waited in hiding for the victim to return to his apartment and armed himself with a more convenient weapon to inflict the lethal blows would also support this aggravating circumstance. The evidence also supports the finding that this murder was calculated and premeditated because appellant planned to commit not only a burglary and a robbery but also a homicide by virtue of the fact that he had chosen and brought a murder weapon (an ax handle) to the scene of the crime. The finding that the murder was heinous, atrocious or cruel is not only based upon the severe beating to the skull with a hammer and the resulting injuries, but also on the fact that the victim had a defensive wound and was conscious after the beating.

The trial court was correct in finding that the capital felony was committed while the appellant was engaged in the commission of a burglary; this factor was conceded below at trial and cannot be raised on appellate

review.

In light of the fact that appellant was two months short of his eighteenth birthday at the time of the offenses and that the evidence amply demonstrated his emotional and psychological maturity, the trial court was correct in not finding the mitigating circumstance of age. In determining that the trial court was correct, this court should also consider the circumstances surrounding the offenses, especially the fact that appellant was the actual murderer and was the dominant personality of the two perpetrators.

The trial court's order imposing the death penalty makes it abundantly clear that the trial court did consider all the non-statutory mitigating evidence, but rejected such on its merits.

The trial court was correct in imposing the death penalty on the basis that the appellant's participation in the homicide was much greater than that of the co-defendant.

POINT III - Double Jeopardy Issue.

Inasmuch as the trial court did not adjudicate appellant guilty of the felony-murder, appellant has already been given the relief that he requests from this court.

POINT IV - Alleged Involuntary Confession.

The record reveals no threats nor psychological ploys which in any way could be interpreted to demonstrate that appellant's statements were involuntary. Lieutenant Fair did not "threaten" appellant with the spectre of the electric chair. Deputy McCormick did not even arguably use any ploys to elicit any incriminating statements, such as by promises of kindness or special treatment. Appellant's request to Deputy McCormick that the interview be in confidence was never granted nor did the deputy ever lead the appellant to believe that the interview was at any time to be held in confidence.

Defense counsel below never argued that the police failure to notify the parents had any effect. There is a fatal disparity between the appellate and the trial argument. In any event, the failure to notify the parents has nothing to do with the voluntariness of the confession.

POINT V - Alleged Trial Errors.

Appellant has failed to demonstrate that the contested photographs were particularly gruesome, cumulative, and irrelevant. As such, the trial court was correct in admitting these photographs, especially in light of the fact that some photographs were actually excluded by the trial court to obviate the problems mentioned by appellant.

Likewise, there was no error in excluding testimony of a witness who would corroborate the fact that Mary Holscher dated the co-defendant in the past prior to dating appellant. The proffer did not establish the fact to be elicited. Assuming arguendo that the trial court erred, it was harmless because other witnesses testified about this relationship, including Mary Holscher.

The statement heard by Tim Kaye, prior to the crimes, that the co-defendant and appellant were talking about using a rubber mallet to render the victim unconscious, was admissible either as a statement made by appellant, as a statement made by a co-conspirator, or as a statement made in the presence of appellant and adopted by him.

There was ample evidence of premeditated murder including the severe head wounds and the admissions made to Mary Holscher.

The circumstantial evidence instruction was totally unnecessary in this case not only because such an instruction is superfluous but also because there was direct evidence of appellant's guilt by virtue of his admissions to Mary Holscher, Deputy McCormick, and Tim Kaye.

Assuming arguendo that any of these issues in trial were errors, such errors would be harmless in light of the overwhelming evidence of guilt.

POINT VI - Lack of a Guidelines Scoresheet.

There was no objection to a lack of a guidelines scoresheet for the underlying sentences based on the burglary and grand theft convictions. Appellant does not contest the fact that the trial court departed on the basis of the capital felony. Therefore, since the sentence is not illegal, a contemporaneous objection would be required. Since no objection was forthcoming at trial, this issue is not cognizable on appeal.

POINT VII - Unconstitutionality of the Death Penalty.

As appellant has acknowledged, all of his arguments challenging the constitutionality of the death penalty on its face and as applied have been rejected. Appellee would point out that all but one of the arguments on appeal were not raised below. Hence, they may not be considered for the first time on appeal.

POINT I

IMPOSING THE DEATH PENALTY AGAINST A JUVENILE IS NOT UNCONSTITUTIONAL PER SE UNDER THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION MERELY ON ACCOUNT OF CHRONOLOGICAL AGE.

Appellant maintains:

> Execution abandons and denies the promise of adolescence-that the impulsive, anti-social acts of teenagers will naturally moderate as they become adults. Killing children and adolescents for their crimes offends the fundamental premises of juvenile justice.

(I.B. 22-23).[1] Such a generalization ignores the specific facts of this case and ignores appellant's background.

In Woods v. Florida, ___U.S.___, 107 S.Ct. 446, __L.Ed.2d__ (1986), a petition for writ of certiorari was denied based upon this issue. Justice Marshall dissented and noted that the defendant was a mentally retarded child who was aged eighteen at the time of the trial.[2] Justice Marshall argued that the court should have taken jurisdiction because the chronological age coupled with the mental retardation could very well violate the Eighth Amendment to the United States Constitution.

Although appellant was not quite eighteen years old, the evidence demonstrates conclusively that he had the intelligence and maturity of an adult. It would be inherently inequitable and unfair to determine that Mr. Woods may be executed and yet appellant cannot merely because of chronological age. If this court were to set a minimum chronological age for the imposition

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[1] The symbol "I.B." will be used to denote portions of appellant's inital brief.

[2] In Woods v. State, 490 So.2d 24, 28 n.7 (Fla. 1986), the trial court found that the defendant was eighteen at the time of the offense and found this a mitigating circumstance.

of the death sentence, there is no doubt that defendants who were older chronologically would contend that mental or emotional deficiencies placed them in the same constitutional category as a seventeen year old murderer who would be immunized by the mere fact of his chronological age. Therefore, this court or the United States Supreme Court would inevitably be forced to attempt to create a constitutional definition of minimum criminal responsibility. Furthermore, the court would have to decide whether a different standard applies in capital and non-capital cases.

Justice Douglas, concurring in Furman v. Georgia, 408 U.S. 245, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), explaining the rationale for declaring the death penalty statute at that time unconstitutional, made the following statement:

> There is evidence that the provision of the English Bill of Rights of 1689, from which the language of the Eighth Amendment was taken, was concerned primarily with selective or irregular application of harsh penalties and that its aim was to forbid arbitrary and discriminatory penalties of a severe nature.

408 U.S. at 241, 92 S.Ct. at 2728. The whole purpose of the death penalty is to make sure the sentence is imposed on an individual basis and not by arbitrary, brightline rules of law. This theme has been reiterated many times by the United States Supreme Court. In McCleskey v. Kemp, __U.S.__, 107 S.Ct. 1756, __L.Ed.2d__ (1987), the Supreme Court rejected, on the basis of the Eighth Amendment, an argument that the death penalty discriminated against certain classes:

> The procedures also require a particularized inquiry into "'the circumstances of the offense together with the character and propensities of the offender.'" (citations omitted). Thus, "while some jury discretion still exists, 'the discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application.'"
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> * * *
>
> In the cases decided after Gregg, the court has imposed a number of requirements on the capital

> sentencing process to insure that capital sentencing decisions rest on the individualized inquiry contemplated in Gregg. In Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), we invalidated a mandatory capital sentencing system, finding that the "respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Id., at 304, 96 S.Ct. at 2291.

107 S.Ct. at 1772.

Appellant's suggestion to declare the death penalty unconstitutional would fly in the face of the individualized consideration which is mandated under the aforementioned decisions. In McCleskey, the supreme court noted: "Each jury is unique in its composition, and the Constitution requires that its decision rests on consideration of enumerable factors that vary according to characteristics of the individual defendant and the facts of the particular capital offense." 107 S.Ct. at 1767. Appellant's argument completely ignores the enumerable factors of the offense and of his character. See also, Proffitt v. Florida, 428 U.S. 242, 259, 96 S.Ct. 2960, 2969, 49 L.Ed.2d 913 (1976), where the Supreme Court explained, "...the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed."

Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), does not stand for the proposition that a juvenile may never be executed solely because of his age, as shown by the following quote: "The trial judge recognized that youth must be considered a relevant mitigating factor. But youth is more than a chronological fact." 455 U.S. at 116, 102 S.Ct. at 877. Furthermore, the Supreme Court explained that "[w]e do not weigh the evidence for them." 455 U.S. at 117, 102 S.Ct. at 878. In a concurring

opinion, Justice O'Connor indicated that she did not read the opinion as limiting the death penalty to exclude those who had not reached the age of sixteen. 455 U.S. at 120, 102 S.Ct. at 879. Furthermore, the facts in Eddings can be distinguished not only by virtue of the age of each defendant, but also because Eddings had an emotional and mental age several years below his actual age while appellant, in contrast, had a maturity which was beyond his actual age.

The fact that different young persons have varying levels of maturity was noted by Justice Powell in his dissent in Fare v. Michael C., 442 U.S. 707, 734 n.4, 99 S.Ct. 2560, 2576 n.4, 61 L.Ed.2d 197 (1979), where he observed:

> Minors who become embroiled with the law range from the very young up to those on the brink of maturity. Some of the older minors become fully "street wise", hardened criminals, deserving no greater consideration than that properly accorded all persons suspected of crime. Other minors are more of a child than an adult. As the court indicated in In re Gault, [citation omitted], the facts relevant to the care to be exercised in a particular case very widely. They include the minor's age, actual maturity, family environment, education, emotional and mental stability, and, of course, any prior record he might have.

(The holding in Fare was that an uncounseled sixteen year old who requested, but was refused permission to see his probation officer was found to be capable of confessing to a murder.) Given the latter analysis under the United States Supreme Court's opinions cited herein and the factors of this case, it is virtually impossible that the imposition of this death penalty would be declared unconstitutional.

Other studies corroborate that juveniles can and do act as adult criminals. The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency in Youth Crime, 119-120 (1967), noted:

> It is recognized that some youths handled by juvenile

> courts are hardened, dangerous offenders, while some adults older than the arbitrary upper age level are emotionally and sometimes physically immature individuals...
>
> * * *
>
> No chronological age bracket is uniformally identical or entirely homogenous.

In Hill, Can the Death Penalty Be Imposed on Juveniles: The Unanswered Question In Eddings v. Oklahoma, 20 Crim.L.Bull. 5, 26 (1984), the author stated:

> An arbitrary age limit below which the death penalty should never be imposed would be almost impossible to determine with certainty. Many persons who have no objection to executing a youth of sixteen or seventeen would be horrified at the thought of executing a ten-year old. Further, if the cut-off age were, for example, to be seventeen years, a hardened and sophisticated sixteen-year old would escape the death penalty while an immature and impulsive seventeen-year old would not. Chronological age is an inherently poor criterion by which to determine actual maturity.

In rejecting the argument set herein, the Supreme Court of Maryland in Trimble v. State, 300 Md. 387, 478 A.2d 1143, 1164 (1984), cert. denied, 469 U.S. 1230 (1985), stated that:

> We do not hold that the death penalty is constitutionally permissible as applied to all juveniles, nor do we hold that any particular chronological age serves as a bright line under which the death penalty may not be imposed. We simply hold that on the facts of this case, Trimble's age - seventeen years and eight months - does not engage the Eighth Amendment as a shield to capital punishment. We believe that such a case-by-case approach not only affords the accused the individual consideration warranted in death penalty cases, but it also avoids the arbitrary line-drawing that is endemic to any hard-and-fast distinction between juveniles and non-juveniles.

Appellee submits this court should follow the well reasoned opinion in Trimble.

Appellant notes that this issue is currently pending before the United States Supreme Court in Thompson v. Oklahoma, __U.S.__, 107 S.Ct. 1284,

__L.Ed.2d__ (1987). Appellee takes issue with this characterization because Thompson was aged fifteen at the time of the offense. Thompson v. State, 724 P.2d 780, 784 (Okla. Cr. App. 1986). Even if the United States Supreme Court decided that it was improper to execute a fifteen year old, such a holding certainly would not extend to the facts in the case at bar. Not only would it be unnecessary for the Supreme Court to reach the issue in the case at bar, but it would also violate Article 3, section 2, clause 1 of the United States Constitution because the facts in this case do not present a case in controversy. In Broadrick v. Oklahoma, 413 U.S 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973), a defendant challenged a state election statute based upon unconstitutional overbreath. The defendant, however, conceded that the statute was not unconstitutional as applied to his specific case. The Court rejected the plaintiff's challenge and explained: "...[U]nder our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the nation's laws." 413 U.S. at 611-612, 93 S.Ct. at 2908. Appellee submits, based on the latter argument, that Thompson v. Oklahoma, supra, should not effect the disposition of the case even if that decision is favorable to the defense.

In any event, it is unlikely that the United States Supreme Court will prohibit all states from executing one who is under the age of eighteen under the aegis of the Eighth Amendment, especially in the case at bar where the perpetrator is almost eighteen and has the sophistication and maturity of an adult criminal. In McCleskey, supra, the Supreme Court dealt with the question of whether the death penalty was applied in a discriminatory fashion based upon statistical studies contrary to the Eighth Amendment. The Court did acknowledge that the Eighth Amendment would draw its meaning from evolving standards of decency but then went on to explain the latter standard as

follows:

> In assessing contemporary values, we have eschewed subjective judgment, and instead have sought to ascertain "objective indicia that reflect the public attitude toward a given sanction." Ibid. First among these indicia are the decisions of state legislatures, "because the ...legislative judgment weighs heavily in ascertaining" contemporary standards, Id., at 175, 96 S.Ct. at 2926.

107 S.Ct. at 1771. In Gregg v. Georgia, 28 U.S. 153, 187, 96 S.Ct. 2909, 2931, 49 L.Ed.2d 859 (1976), the Supreme Court, explained:

> The value of capital punishment as a deterent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.

Ward v. State, 733 S.W.2d 728, 733-734 (Ark. 1987), declared that Arkansas did not expressly prohibit the death penalty for a juvenile. The court went on to explain: "We join the majority of those states presented with the question which we have decided that the imposition of the death penalty on a juvenile is not per se a violation of the Eighth Amendment to the United States Constitution." The court went on to note other state's decisions vis-a-vis this issue: State v. Valencia, 124 Ariz. 139, 602 P.2d 807 (1979); State v. Harris, 48 Ohio St.2d 351, 359 N.E.2d 67 (1976); Ice v. Commonwealty, 667 S.W.2d 671 (Ky. 1984); High v. Zant, 250 Ga. 693, 300 S.E.2d 654 (1983); Thompson v. State, 724 P.2d 780 (Okla. 1986); Prejean v. Blackburn, 743 F.2d 1091 (5th Cir. 1984); Trimble v. State, 300 Md. 387, 478 A.2d 1143 (1984); State v. Battle, 661 S.W.2d 487 (Mo. 1983); Cannaday v. State, 455 So.2d 713 (Miss. 1984). See also, High v. Kemp, 819 F.2d 988, 993 (11th Cir.) (upholding the death penalty even though the perpetrator was age seventeen).

In light of section 39.02(5)(c)3, Florida joins the majority of states in

declaring that the death penalty, under certain circumstances, is permissible even though the perpetrator is under age eighteen. In Magill v. State, 457 So.2d 1367, 1371 (Fla. 1984), the juvenile defendant, pursuant to a motion for post-conviction relief, wanted to declare the death penalty unconstitutional because of his age. This court held that this issue was not cognizable pursuant to a motion for post-conviction relief. Had this court believed that the execution of any juvenile, no matter what the circumstances, was per se unconstitutional under the Eighth Amendment, no doubt this court would have held that such an error would be fundamental and would be cognizable pursuant to post-conviction relief.

Two seventeen year olds have actually been executed. Rumbaugh v. Procunier, 753 F.2d 395 (5th Cir. 1985); Roach v. Martin, 757 F.2d 1463 (4th Cir. 1985). Both were aged seventeen. Charles Rumbaugh was executed on September 11, 1985. James Roach was executed on January 10, 1986. N.A.A.C.P. Legal Defense and Educational Fun, Inc., Death Row, U.S.A., 4 (May 1, 1987). It also should be noted that as of July 15, 1986, there were thirty two juveniles on death row, twenty two of them aged seventeen. Victor Streib, PERSONS ON DEATH ROW AS OF JULY 15, 1986 FOR CRIMES COMMITTED WHILE UNDER AGE EIGHTEEN, Criminal Law Section newsletter, the Florida Bar, Vol. IX, n.1, page 11 (Sept. 1986).

In McCleskey, supra, the Supreme Court, in explaining the relationship between states and the Court vis-a-vis the death penalty, explained:

> "Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe." Id., at 186-187, 96 S.Ct. at 2931.

Appellee submits that appellant has not presented any convincing evidence either below or on appeal herein, in support of having the death penalty declared unconstitutional in this case, with the exception of the appellant's mere chronological age. Such a factor certainly should not be determinative.

Appellant argues that the goal of deterrence is inapplicable to juveniles because juveniles have no judgment. Again, this general argument is not applicable to this particular case and ignores the facts. See, Statement of the Facts and Point II, infra. In Gregg, supra, the Supreme Court distinguished the different types of murders where the death penalty would or would not be applicable:

> We may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterent effect. But for many others, the death penalty undoubtedly is a significant deterent. There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act.

(footnote omitted). 428 U.S. at 186-187, 96 S.Ct. at 2931. Appellant's chronological age does not change the fact that this murder was the result of "cold calculus" and certainly cannot be considered an impulsive act by any stretch of the imagination. The Supreme Court of Maryland summed up the situation in the case very well in upholding the death penalty of a juvenile in Trimble, supra. That court explained:

> This is not a case like Enmund where the deterrent function of the criminal law could not operate because the defendant did not intend to kill the victim. Trimble's culpability level was unaffected by his age, which was only four months from the age of maturity. Imposition of the death penalty in this instance will send a message to others contemplating similar acts that society will respond harshly to their actions. In short, we believe that seventeen-year-old youths can be deterred from committing brutal rape-murders, so the legislature's judgment in that regard is not a purposeless act.

Appellant, in this respect, is in the same posture as Mr. Trimble. Certainly his "culpability level" was unaffected by his chronological age.

Finally, appellant maintains that the prospects for rehabilitation of a juvenile have been ignored when a death sentence is imposed. Recent studies show, however, that rehabilitative efforts in the juvenile area have had tremendous failures. New York Times, March 5, 1982. B 4, Col. 1-3; Law Enforcement Assistance Administration, U.S. Dept. of Justice, Reports of the National Juvenile Justice Assessment Centers, Juvenile Delinquency Prevention Experiments: Review and Analysis (1980); R. Fine, Escape of the Guilty, 164-165 (1986). Indeed, studies note that the results of the Cambridge-Summerville Youth Project showed that the study group which received years of intensive counselling fared worse than the study group that received no special attention. Law Enforcement Assistance Administration, U.S. Dept. of Justice, supra, at 24.

Other studies have shown that chronic juvenile offenders, a group within which the appellant in the present case falls, not only commit most of the crimes committed by juveniles, but generally continue to commit crimes as adults. Office of the Juvenile Justice and Delinquency Prevention, U.S. Dept. of Justice, Delinquency in Two Births Cohorts: Executive Summary, at iii, 24 (1985). Moreover, the rehabilitative factor must be considered on an individualized basis, as it was in the case at bar, and not in reference to vague generalities.

Appellant first supports his argument that imposing the death penalty against a juvenile is unconstitutional per se based merely upon his

chronological age[3], by noting that many Florida Statutes address various issues based upon a person's youthful age. Yet the Florida legislature recognizes that juveniles can be treated as adults for purposes of criminal prosecution. After a juvenile has been transferred to adult-criminal court, a trial court must consider a number of factors under section 39.111(6)(c), Florida Statutes (1985) when determining whether adult sanctions are suitable or not. The first criterion is the seriousness of the offense and whether the protection of the community requires adult disposition. In light of the facts presented at the guilt phase as well as the penalty phase, there is no question that this criterion would be met. The next factor to consider is whether the offense was committed in an aggressive, violent, premeditated, or willful manner. Again the facts in this particular case would support this factor. The next consideration is whether the offense was against persons or property, with greater weight given to personal offenses, especially if injury resulted. Again, this criterion is obviously satisfied under the facts of this case. The fourth criterion requires the trial court to consider the sophistication and maturity of the child, as determined by considerations of his home, environment, emotional attitude and pattern of living. As discussed in detail in Point II, infra, there was considerable testimony indicating that this juvenile was very mature for his age. The fifth criterion refers to the juvenile's previous criminal history and prior contacts with law enforcement agencies. The trial court noted in its order imposing the death penalty that appellant had previously pled guilty to trespass, three counts of grand theft, and burglary in juvenile court. He was adjudged delinquent on January 10,

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[3] Appellant was seventeen years and ten months old at the time he committed the crime (R 3337).

1985. The trial court noted his record reflected his inability to comply with the conditions of community control and after-care (R 3334). Hence, the latter findings established that this criterion would have been met. The sixth and last consideration under this statute requires the court to consider the prospect for adequate protection of the public and the likelihood of reasonable rehabilitation. Doctor Whitacre testified at the penalty phase that appellant was manipulative (R 1499-1500). He was diagnosed as having an anti-social personality (R 1502). Such a disorder would be manifested by behavior such that one could not sustain a job, would lie, steal, fight, commit truancies, and resist authority (R 1535). Such a personality disorder was not genetically determined but learned (R 1495, 1525). Although behavior modification would be a possible treatment, there was little success with this mode of therapy (R 1527-1528). Hence, the trial court could well find that appellant had very little prospect for being rehabilitated. There is no doubt that the legislature recognizes that certain persons under the age of eighteen are juveniles by virtue of their age. Likewise, the legislature recognizes that certain juveniles are in reality very mature and behave as adults when committing crimes.

Section 39.02(5)(a), Florida Statutes (1985), allows even a fourteen or fifteen year old to be prosecuted as an adult after a waiver hearing has been held. Section 39.04(2)(e)4, Florida Statutes (1985), allows the state attorney to file an adult information against a juvenile who is age sixteen or seventeen. Thus the legislature recognizes that juveniles in this older age

group are more likely to reflect adult criminal behavior.[4] Finally, appellee would emphasize that section 39.02(5)(c)3, Florida Statutes (1985), explicitly authorizes the state to indict a child and if that child is found guilty as charged of the capital offense, explicitly authorizes the death penalty. Appellant cannot cogently argue that the legislature intended differential treatment for all juvenile offenders, especially in light of the latter statutes.

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[4] Under this statute, if a juvenile is charged with a misdemeanor and he does not have a prior record, the case may be transferred back to juvenile court. Under section 39.04(2)(e)4, Florida Statutes (1979), a filing of a criminal information against a juvenile could be defeated, even if it were a felony, when that juvenile had no prior record. The change in the statute reflects the legislature's concern with juveniles in this age group and the seriousness of the offenses that they are capable of committing.

POINT II

THE TRIAL COURT PROPERLY FOUND AGGRAVATING CIRCUMSTANCES SUPPORTING THE DEATH PENALTY CONSIDERED BUT PROPERLY REJECTED MITIGATING TESTIMONY.

Appellant challenges the four aggravating circumstances found by the trial court to support the death penalty. In addition appellant maintains that the trial court erred when it failed to find appellant's age of seventeen as a mitigating factor. Appellant also complains that the trial court did not even consider mitigating evidence and that the trial court failed properly to assess the co-defendant's participation in the offense, even though the trial court did find that the co-defendant's participation was a mitigating factor. Appellee will address the issues in the same order as presented by appellant.

A. AGGRAVATING FACTORS

1. The Trial Court Properly Found that Appellant was Previously Convicted of Another Capital Felony Involving Use or the Threat of Violence Pursuant to Section 921.141(5)(b), Florida Statutes (1985), or, the Evidence Established Another Separate, Aggravating Factor Pursuant to 921.141(5)(f), Florida Statutes (1985).

The trial court found that appellant previously was convicted of another capital felony, i.e., based upon the burglary and the homicide in the victim's apartment (R 3331). Appellant argues that this finding would be improper under Wasko v. State, 505 So.2d 1314 (Fla. 1987), even though Hardwick v. State, 461 So.2d 79 (Fla. 1984) would authorize such a finding. Recently, this court in Patterson v. State, 12 F.L.W. 528 (Fla. October 23, 1987), held that it was improper to use an armed sexual battery conviction as a basis for this aggravating circumstance since the latter offense was committed during the capital felony in question. This court, based on that holding, receded from Hardwick v. State, 461 So.2d 79 (Fla. 1984).

In Hardwick, Justice McDonald dissented because this aggravating factor pertaining to a previous conviction of a capital felony would be counted twice under section 921.141(5)(d), Florida Statutes (1985), which allows an aggravating factor to be found when the capital felony was committed while the defendant was engaging in enumerated felonies. See also, Griffin v. State, 474 So.2d 777, 780-781 (Fla. 1985), where this court initially set forth its concern pertaining to this issue.

Based upon the latter rationale, appellee submits the totality of the circumstances support other aggravating factors that were not found by the trial court, even if this factor is found to be improper. This court, in Echols v. State, 484 So.2d 568, 576-577 (Fla. 1985), noted that the trial court inexplicably failed to find an additional aggravating circumstance. This court did take account of that aggravating circumstance, because it was:

> ...In accordance with our responsibility to review the entire record in death penalty cases and the well-established appellate rule that all evidence and matters appearing in the record should be considered that support the trial court's decision.

The trial court specifically noted that it would have found that the capital felony was committed for pecuniary gain under section 921.141(5)(f), but that such a finding would be a duplication of the previous finding that appellant was convicted of another capital felony involving the use of violence under section 921.141(5)(b) (R 3332). Hence, if this court does choose to strike the latter aggravating factor, the former aggravating circumstance should be found.

Appellee is aware that the trial court found that the capital felony was committed while the defendant was engaged in the commission of a burglary with an assault therein pursuant to section 921.141(5)(d), Florida Statutes (1985). Nevertheless, there would be no "doubling" because the latter

aggravating factor could be found either pursuant to a burglary with an assault (which does not entail the factor of pecuniary gain) or pursuant to a robbery.[5] Echols, supra. See also, Quince v. State, 414 So.2d 185, 188 (Fla. 1982), holding that there was no "doubling" in finding the aggravating circumstances of sexual battery and pecuniary gain.

In conclusion, appellee submits that this court can properly find the aggravating circumstance of pecuniary gain if this court strikes the finding pursuant to 921.141(5)(b). In King v. State, 390 So.2d 315, 320-321 (Fla. 1980), this court explained: "The legislative intent is clear that any violent crime for which there was a conviction at the time of sentencing should be considered as an aggravating circumstance..." Since this murder not only was based upon pecuniary gain but entailed the offenses of robbery and burglary with an assault, appellee maintains that two aggravating circumstances have been established under section 921.141(5)(f) and under section 921.141(5)(b) or 921.141(5)(d).

2. The Trial Court Properly Found that the Capital Felony was Especially Heinous, Atrocious or Cruel Pursuant to Section 921.141(5)(h), Florida Statutes (1985).

Appellant maintains that the facts do not support the trial court's finding that the murder was especially heinous, atrocious or cruel. Appellant specifically argues that there is no indication that the victim knew what was

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[5] In order to find an aggravating factor under section 921.141(5)(d), it would not be necessary for the state to have charged nor the defendant to be convicted of one of the enumerated felonies. See, Teffeteller v. State, 439 So.2d 840, 846 (Fla. 1983), finding an aggravating circumstance based upon the fact that the capital felony was committed while the defendant was attempting to commit a robbery and finding that this factor would be supported regardless of whether the defendant was convicted of felony murder or premeditated murder; Stano v. State, 460 So.2d 890, 893 (Fla. 1984), finding that the murder was committed during the commission of a kidnapping.

happening. Appellant argues that this case does not represent a factual scenario where the victim is subjected to prolonged torture with full knowledge of his impending demise. It is, however, unnecessary for the state to demonstrate that the victim suffered prolonged torture in order for this circumstance to be upheld.

It should be noted, contrary to appellant's speculation, that the victim did not instantly die. At the penalty phase, the co-defendant testified that after the victim was struck with the hammer he fell and was moaning (R 1341). The victim rolled his head from side to side. The victim had not fallen completely so the appellant pulled the victim's feet and then the victim fell. The victim was still moaning (R 1342). Appellant then kicked the victim in the face and at that point the victim stopped moaning (R 1342). The medical examiner noted that there was swelling on the victim's hand and testified that such swelling was consistent with a defensive wound (R 308-311). Both of these latter facts were noted in the trial court's order imposing the ultimate sentence (R 3333). Both factors, likewise, support the finding.

Such defensive wounds have been considered by this court in upholding this factor. Waterhouse v. State, 429 So.2d 301, 307 (Fla. 1983); Roberts v. State, 12 F.L.W. 325, 329 (Fla. July 2, 1987); Hansbrough v. State, 12 F.L.W. 305, 307 (Fla. June 18, 1987).

Moreover, that the victim was struck six times with a claw hammer on his head, where each blow was of sufficient force to penetrate the skull, amply supports this aggravating factor even if it is assumed for the sake of argument that the victim perished instantly after the first blow was struck. Heiney v. State, 447 So.2d 210, 215-216 (Fla. 1984) (seven to nine blows to the head with a claw hammer where the victim had defensive wounds on the hands

and wrists); Thomas v. State, 456 So.2d 454, 457 (Fla. 1984) (where the victim was discovered unconscious, beaten, kicked or bludgeoned so severely that his skull was fractured in many places); Adams v. State, 341 So.2d 765, 769 (Fla. 1976) (the victim was brutally beaten with a fire poker and his body was grossly mangled); Duest v. State, 462 So.2d 446 (Fla. 1985) (the victim suffered eleven stab wounds and lived a few minutes before dying); Morgan v. State, 415 So.2d 6, 12 (Fla. 1982) (the victim was a prison inmate who suffered ten stab wounds, one or more which caused the death).

Appellant cites Simmons v. State, 419 So.2d 316 (Fla. 1982) to support his proposition. That case is distinguishable because the victim died an instantaneous death. As noted above, in the case at bar there was a defensive wound and the victim moaned and moved for a period of time after he was struck six times with the claw hammer. The case of Halliwell v. State, 323 So.2d 557 (Fla. 1975), likewise does not help appellant's cause; in discounting the aggravating factor, the Halliwell court noted that the motive of the murder involved a "love triangle." More importantly, the brutal beating and mutilation of the body occurred after the victim had died. Even if Halliwell were on point, appellee would note that the case entailed three dissents.

Appellant has not come close to demonstrating that the trial court erred in finding this particular aggravating circumstance.

3. The Trial Court was Correct in Finding that the Murder was Committed in a Cold, Calculated and Premeditated Manner Pursuant to Section 921.141(5)(i).

Appellant's theory is that the only heightened premeditation pertained to the burglary/robbery but not to the homicide itself. The record belies such a premise.

It is true that there was much talk and planning about the burglary/robbery. Tim Kaye testified about this prior planning and how the

appellant and co-defendant talked about either using their fists or a rubber mallet to commit the robbery (R 890-891, 893). Appellant divulged this prior planning in his confession to Deputy McCormick (R 854). At the penalty phase, the co-defendant also testified about the prior planning and told the jury that appellant planned to knock the victim out with a stick and take his wallet (R 1325-1326). He indicated that the two had gone to the victim's dwelling a week before but the victim had not come home (R 1326-1327, 1329). After that they returned to the victim's place every other day for about a week (R 1330).

What sets this case apart from the mere planning of a burglary/robbery is the fact that appellant retrieved an ax handle from the victim's house on one of the occasions when the two perpetrators went to the victim's abode before they actually committed the offenses under review (R 1328). At trial, Mary Holscher corroborated this fact when she testified that the perpetrators took Frank Clauser's car, which had the ax handle in it (R 676, 683-684). Indeed, the same ax handle was found on the victim's premises and admitted into evidence (R 372, 3241D).

Hence, the fact that appellant brought the murder weapon (not a rubber mallet) to the burglary, would support the trial court's finding. As the trial court noted: "This is not changed by the fact that he substituted a more suitable weapon once he arrived at the murder scene." (R 3334). Indeed, the fact that appellant had to find a more suitable weapon in order to carry out his foul deed would exacerbate this finding. Mary Holscher testified that appellant explained the ax handle would not work as well because it would scrape against the ceiling and hence he had to use the claw hammer (R 663-664). Case law supports the trial court's finding. Eutzy v. State, 458 So.2d 755, 757-758 (Fla. 1984) (execution of and theft from a cab driver); Huff v.

State, 495 So.2d 145, 153 (Fla. 1986) (the murder of the defendant's parents, who were riding with the defendant in a car in a secluded area which was known to the defendant, and where it was shown that the defendant knew in advance that he would be riding with his parents and brought the murder weapon with him in the car); Davis v. State, 461 So.2d 67, 72 (Fla. 1984) (entering a home armed with a pistol and with a rope used to bind one of the victims); Dufour v. State, 495 So.2d 154, 164 (Fla. 1986) (where the defendant announced to his girlfriend that he was going to rob and kill a homosexual, and where the victim was found shot in the back of the head in an orange grove); Jennings v. State, 12 F.L.W. 434, 437 (Fla. August 27, 1987) (where the defendant kidnapped a six year old victim from her home and committed a sexual battery and homicide); Troedel v. State, 462 So.2d 392, 399 (Fla. 1984) (involving the burglary/robbery and murder of two victims while they were at home, where the victims were shot in the head and pillows were used to muffle the shots).

The mere fact that the appellant waited in hiding for the victim's return and armed himself with a weapon would support the finding of heightened premeditation, even if one assumes for the sake of argument that there was no prior planning whatsoever. In McCray v. State, 416 So.2d 804, 807 (Fla. 1982), this court explained that this aggravating factor normally applies to executions or contract murders, although that description was not intended to be all inclusive. Although the facts demonstrate that this was, in essence, an execution type murder, because it was so well planned, even if there had not been prior planning, this factor would still be supported by the fact that appellant armed himself and hid, waiting for his victim. See, Middleton v. State, 426 So.2d 548, 552-553 (Fla. 1982) (where the defendant, who was living with the victim, sat down with a shotgun in his hands for about an hour looking at the victim as she slept); Mason v. State, 438 So.2d 374, 379 (Fla.

1983) (where the defendant broke into the victim's home, armed himself in her kitchen, and attacked the victim as she lay sleeping in her bed); Phillips v. State, 476 So.2d 194, 197 (Fla. 1985) (where the defendant waited for the victim to leave work, confronted the victim in a parking lot and shot him two times, and as the victim fled shot him again, and where this court noted that the defendant had to reload his revolver, affording the defendant time to plan his actions).

The finding of heightened premeditation is supported by two theories: 1. That the appellant brought the murder weapon to the burglary after much planning and, 2. That the appellant waited in hiding in the victim's apartment and obtained a claw hammer. When these two factors are considered in conjunction with each other, there is no question that the trial court correctly found this aggravating circumstance.

4. The Trial Court was Correct in Finding that the Capital Felony was Committed while the Defendant was Engaged in a Burglary Pursuant to Section 921.141(5)(d), Florida Statutes (1985).

Appellant maintains that this factor cannot be used in aggravation because, in effect it would mandate that all felony murders would have a built-in aggravating factor. First of all, appellee notes that the defense attorney conceded this aggravating factor when arguing at the penalty phase (R 1981). Although appellant filed a previous written motion arguing this ground, his later argument abandoned this claim (R 3354-3355). This argument is not cognizable on appellate review because it was not asserted as a legal ground for objection below. Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).

Appellant acknowledges this contention has already been rejected by this court in Breedlove v. State, 413 So.2d 1 (Fla. 1982) and Quince v. State, 414 So.2d 185 (Fla. 1982). See also, Teffeteller v. State, 439 So.2d 840 (Fla.

1983); White v. State, 403 So.2d 331 (Fla. 1981). Appellee would ask this court to continue to reject this argument.

In any event, this homicide is not a mere felony murder. The evidence amply supports premeditation. In addition, under this aggravating factor, the evidence demonstrates that the homicide was done not only pursuant to a burglary with an assault but also pursuant to a robbery.

B. MITIGATING CIRCUMSTANCES

1. The Trial Court did not Abuse its Discretion in Finding that Age was not a Mitigating Circumstance Pursuant to Section 921.141(6)(d), Florida Statutes (1985).

Appellant maintains that the trial court abused its discretion in failing to find the mitigating circumstance of age based upon the evidence and upon the mere fact of appellant's chronological age. The trial court correctly noted that appellant was only two months shy of his eighteenth birthday at the time he committed the murder (R 3337).

To the extent that appellant now argues that the trial court erred as a matter of law based upon the mere chronological fact of appellant's age, appellee submits this issue was not preserved for appellate review. Not only was it not preserved for review, but the trial attorney also specifically argued that age per se would not account for this circumstance (R 1825-1826). Specifically, the defense attorney, when arguing to the trial court, indicated:

> What happens if the seventeen year old defendant commits an intentional arson because he is mad at his girlfriend or something and kills fifty people. Should he not be exposed to the death penalty? Maybe the legislature said yes, he should. We're not going to mandate he is never going to have the death penalty.

(R 1960). The defense attorney continued to discuss the situation with the court and mentioned that chronological age could be a factor, but then

informed the court:

> Well, we do find his chronological age, when taken into account, along with the psychological reports we have, his inadequate performance in school, his background of not being able to adequately live on his own, even though he may have been living away from home at the time, but living on his own, establishing --Mrs. Adache's son, eighteen years old, working for the county for a year already, had a car already, had an apartment. There is a contrast for you right there, if you want to talk about social maturity and even intellectual maturity.

(R 1962). In light of these comments, appellee submits this issue vis-a-vis chronological age cannot be reviewed. Steinhorst, supra at 338.

The record uncategorically belies the appellant's assertion that the evidence is "replete" with instances of appellant's "lack of maturity."

Appellant attempts to buttress this theory by pointing out that he abused drugs. Apart from the fact that the latter is certainly not an exclusively juvenile characteristic, appellant's mother testified that when he was treated at the Horizon House, the diagnosis was depression, not a drug dependency problem (R 1393). Next appellant features the fact that he quit school. Again, such a factor is not a function of mere age; no matter what the age of a murderer, he may have quit school at an early age. Appellant notes that he was sent to a drug treatment center. Again, such a factor is not limited to juveniles. Appellant's attorney represented that appellant placed himself in this Horizon Hospital (R 1955), but, if anything, such an act indicates that the appellant had more maturity than most people his age. Appellant notes that he resided with his parents. Yet his mother testified that he had been living outside of the home in Orlando for about six weeks prior to his arrest (R 1399).

Appellant emphasizes the fact that he was diagnosed at the Horizon House as having a chemical imbalance which would induce depression at times. Again

there is no correlation between such a condition and a person's chronological age. Moreover, Dr. Cole testified that appellant was much better and was not depressed when he was released from the Horizon House (R 1724, 1746). Furthermore, the doctor testified that such a condition would go in cycles and that a person could become better after a period of time (R 1734). In any event, Dr. Whitacre, a clinical psychologist who interviewed appellant after he was released from the Horizon Hospital, acknowledged the depression diagnosis of Dr. Cole but believed that the latter was not "diagnostic." (R 1503-1504). Dr. Whitacre explained that appellant was situationally agitated but not significantly depressed at that time (R 1517).

Appellant also speculates that denying or hiding his drug-abuse problem is an "adolescent" trait. Apart from the fact that there was no expert testimony to support that untenable generalization, such a conclusion is totally unsupportable. Obviously many adults who have substance-abuse problems will deny or hide those problems as well. In any event, Dr. Whitacre testified that appellant's major use of drugs was limited to marijuana and did not include stronger or more lethal narcotics (R 1485). Dr. Whitacre indicated that the marijuana did not effect appellant's reality testing (R 1488-1489). Furthermore, Dr. Cole testified that he saw appellant every other day at Horizon House and appellant did admit his drug problem (R 1710).

Appellee will highlight the testimony which supports the trial court's finding that appellant acted more as an adult than a juvenile: Dr. Whitacre testified that appellant functioned as an adult on a psychological level (R 1542-1543). Patricia Hardes, testifying for appellant at the penalty phase, considered appellant mature (R 1888). Appellant was able to work and earn money to purchase an automobile (R 1397-1398). Appellant's brother, William, testified that he left home at age seventeen and owned his own

apartment and paid the bills. He believed that his brother could do the same. He also testified that his brother has held a job (R 1462). Dr. Whitacre explained that because an adolescent was dependent for food, clothing and other items, such factors would not necessarily imply immaturity (R 1508-1509). Many adults, testifying on appellant's behalf, indicated that they had confided in him (R 1406, 1632-1633, 1639, 1646, 1651, 1653-1654).

Moreover, in considering the level of maturity of appellant, the trial court correctly considered the circumstances surrounding the crime. Obviously, this offense, preceded by weeks of planning, is not the type of crime which would be considered a "juvenile" offense. Mary Holscher testified that appellant confided to her that he thought about killing the co-defendant after brutally murdering the victim to make it look like the victim and the co-defendant had struggled (R 664). Deputy McCormick, Tim Kaye, and the co-defendant all testified that the offense involved planning and casing the victim's apartment prior to the actual offense (R 854, 890-891, 1326-1330). When the co-defendant was unsuccessful in forcing the victim's apartment door open, appellant used the lug wrench and successfully broke in (R 666-667, 1334). Appellant directed the co-defendant to be a look-out while they were inside the apartment (R 1335). He also directed the co-defendant to hide when the victim finally returned to his home (R 663, 1339). When the co-defendant suggested calling the emergency number "911" for an ambulance, appellant indicated they would not do so because their voices would be recorded (R 1344). Both perpetrators used gloves and socks during the commission of the crime (R 698). Appellant also took Mary Holscher to a ditch where he had previously disposed of the victim's wallet. He had thrown it into the water so that there would be no fingerprints on that wallet (R 666). Both the facts of the crime and of appellant's background overwhelmingly demonstrate that

appellant functioned as an adult and was a juvenile only by virtue of his chronological age.

Appellee will address the argument that the trial court erred in not finding this mitigating circumstance based upon the mere age of appellant. Appellant quotes from Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), and asserts that the case stands for the proposition that a state must find such a mitigating circumstance based upon the offender's age. The argument made by appellant herein was made and rejected in Eddings v. State, 616 P.2d 1159 (Okl. Cr. App. 1980). The United States Supreme Court had an opportunity, of course, to rule on this issue in Eddings, supra, but chose to reverse it on other grounds. Moreover, the Supreme Court's Eddings decision featured the fact that the fifteen year old perpetrator's emotional and mental age was several years below his actual age. The opinion noted that a psychiatrist testified that Eddings acted as a seven year old when he pulled the trigger. 455 U.S. 109, n.2, 102 S.Ct. 873, n.2. Another quote from Eddings would belie appellant's contention that the case stands for the proposition that mere chronological age mandates a finding of a mitigating circumstance. That quote is as follows: "The trial judge recognized that youth must be considered a relevant mitigating factor. But youth is more than a chronological fact." 455 U.S. 116, 102 S.Ct. 877.

This court has made it clear that section 921.141(6)(g), Florida Statutes (1985), does not mandate that this mitigating circumstance be found based upon mere chronological age. Such a conclusion is only logical since the legislature could have decreed, but chose not to, that a certain age would require this finding. This rationale was explained in Eutzy v. State, 458 So.2d 755, 759 (1984) (where the defendant was forty three at the time of the crime and the defense argued that he would be sixty-eight at the time of his

release if not sentenced to death), which is as follows:

> Mitigating circumstances, must, in some way, ameliorate the enormity of the defendant's guilt. For this reason, age is a mitigating circumstance when it is relevant to the defendant's mental and emotional maturity and his ability to take responsibility for his own acts and to appreciate the consequences flowing from them.

In Amazon v. State, 487 So.2d 8, 13 (Fla. 1986), this court noted that the defendant was an emotional cripple and had the emotional maturity of a thirteen year old so the finding of the mitigating circumstance of age was upheld. Nevertheless, this court went on to explain that an age of nineteen was not "per se" mitigating.

In Echols v. State, 484 So.2d 568, 575 (Fla. 1985), where the defendant's age was fifty eight, this court explained:

> It should be recognized that age is simply a fact, every murderer has one,...However, if it is to be accorded any significant weight, it must be linked with some other characteristics of the defendant or the crime such as immaturity or senility.

There are a number of cases where this court has refused to overturn a trial court's ruling that this circumstance was not established, despite the young age of the offender. Garcia v. State, 492 So.2d 360, 367 (Fla. 1986) (age 20); Kokal v. State, 492 So.2d 1317, 1319 (Fla. 1986) (age 20); Mason v. State. 438 So.2d 374, 379 (Fla. 1983) (age 20); Peek v. State, 395 So.2d 492 (Fla. 1981) (age 19); Deaton v. State, 480 So.2d 1279, 1283 (Fla. 1985) (age 18). In Cooper v. State, 492 So.2d 1059, 1062-1063 (Fla. 1986), this court upheld the trial court's ruling that age eighteen did not establish this mitigating factor and explained: "...He was legally an adult. The testimony indicates that he was mature, understood the distinction between right and wrong and the nature and consequences of his actions." Appellant, who was just two months short of his eighteenth birthday, is in the same posture as

Mr. Cooper. Given the enormous amount of testimony indicating that appellant functioned well above his chronological age, appellee submits that the trial court's ruling on this factor must be upheld.

2. The Trial Court Properly Considered and Rejected Appellant's Presentation of Non-Statutory Mitigating Factors.

Appellant claims that the trial court did not properly assess the weight to be given to the non-statutory factors adduced at the penalty phase. A trial court is not compelled to find mitigating circumstances as long as they are considered. Valle v. State, 474 So.2d 796, 804 (Fla. 1985); Suarez v. State, 481 So.2d 1201, 1210 (Fla. 1985). The determination whether or not a mitigating circumstance is to be given any weight is within the trial court's domain; reversal is not warranted simply because appellant draws a different conclusion. Stano v. State, 460 So.2d 890, 894 (Fla. 1984).

Appellant offers language from the trial court's order imposing the death penalty as evidence that the trial court did not consider the non-statutory mitigating factors: "The Court finds that none of these factors rise to the level of a mitigating circumstance to be weighed in the penalty decision. (R 3339)." In Hansbrough v. State, 509 So.2d 1081, 1086 (Fla. 1987), this court cited to almost identical language in rejecting this argument, which is as follows: "The instant trial judge found that Hansbrough's mitigating evidence did not rise to the level of the statutory mitigating circumstances..." The language in the trial court's order makes it clear that he did consider and reject the contested evidence.

In Woods v. State, 490 So.2d 24, 27-28 (Fla. 1986), the defendant argued that the trial court failed to consider unrebutted non-statutory mitigating evidence. This court explained:

> That the trial court did not articulate how he considered and analyzed the mitigating evidence is not necessarily an indication that he failed to do so. We

> do not require that trial courts use "magic words" when writing sentencing findings, and we recognize that some findings are inartfully drafted.

To reinforce the point that the trial court did properly consider mitigating evidence, appellee would emphasize the following language from the order imposing the death sentence: "The defense put on evidence to establish non-statutory mitigating factors. Among these considered by the court are the following:" (R 3337). The order then went on to detail fifteen specific factors of the non-statutory mitigating evidence (R 3337-3338). In this same order, the judge delved into great detail to specifically negate the mitigating factor of alcohol and drug related effects (R 3338).

The appellant's argument on this point has no merit whatsoever.

3. The Trial Court Was Correct In Finding that the Co-defendant's Participation and Sentence Was Disproportionate and Therefore Correctly Imposed the Death Penalty Against Appellant.

In the order imposing the ultimate sentence, the judge did find one mitigating, non-statutory circumstance. The order noted that but for the co-defendant's participation, the victim would be alive (R 3339). Based on that limited language from the order, appellant asserts that the trial court erred in imposing the death penalty. This language, however, should be placed in its proper context.[5]

The same order explained that appellant's actual conduct was more culpable than that of the co-defendant (R 3339). The order also noted that it was the appellant who originally intended to strike the victim with the ax handle. The order explained that the co-defendant would not have participated

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[5] Whether the trial court gives a mitigating circumstance some weight, or no weight at all, is within the trial court's domain, and such a finding cannot be reversed unless it is clearly erroneous. Stano, supra at 894; Quince, supra at 188.

in the offenses if he knew appellant intended to kill the victim. The trial court also noted in its order that the co-defendant wanted to stop the appellant from inflicting more blows. The co-defendant's suggestion to call an ambulance after the offenses occurred was rejected by appellant (R 3339).

Furthermore, in this same order, the trial court rejected the mitigating circumstance that the appellant was an accomplice in the felony which was committed by another person. The court explained that the appellant was the one who actually delivered the fatal blows and he was the major participant (R 3335). Nor did the trial court find that there was a showing that appellant was dominated by the co-defendant or under duress. The trial court noted in the same order that the appellant appeared to be the stronger personality of the two perpetrators (R 3335). Based upon these findings, it is clear that the trial court had a strong basis to differentiate the punishments. Appellant's reliance upon Messer v. State, 330 So.2d 137, 141-142 (Fla. 1976), is misplaced because that case only addressed the issue where the trial court refused to allow the jury to hear about the co-defendant's participation. Obviously, in the present case, the jury heard an abundance of evidence about the co-defendant's participation and about the sentence that he received as a result of a plea bargain. There is no question that 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, 1182 (Fla. 1985); Deaton, supra, at 1283.

POINT III

NO DOUBLE JEOPARDY ISSUE EXISTS AND THERE IS NO CONCEIVABLE PREJUDICE EVEN IF SUCH AN ISSUE EXISTED.

Two separate indictments were submitted to the jury based on the homicide: felony murder and premeditated murder. Although the jury came back with convictions on both offenses, as appellant has admitted, the trial court adjudicated appellant guilty only of the premeditated murder offense. Notwithstanding that action, appellant argues that it was improper to submit both verdicts to the jury without an instruction that it could return only a single verdict. Appellee submits that no such jury instruction was proposed under the requirements of Florida Rule of Criminal Procedure 3.390(d). As such, the issue has not been preserved for appeal.

Appellant argues that there is prejudice resulting from the trial court's submission of both verdicts to the jury because appellant, in attempting to cast reasonable doubt as to the premeditated murder offense, would be forced to admit the felony murder.

In Knight v. State, 338 So.2d 201, 204 (Fla. 1976), this court declared that it was proper to charge premeditated murder and convict the defendant under the theory of premeditated murder or felony murder. Knight, in turn used the reasoning in Barton v. State, 193 So.2d 618 (Fla. 2d DCA 1967), to justify its holding. In Barton the defendant was charged with premeditated murder but complained that he was forced to prepare a defense for premeditated murder and felony murder. He further complained that these defenses were necessarily inconsistent. Barton rejected this theory and indicated that the defendant could be convicted of either type of homicide.

Appellant's argument is enigmatic. It would make absolutely no difference whether the state charged appellant with one count of premeditated

murder or two counts as was done in the case at bar; appellant would still have to defend against both theories of murder. If appellant is forced to admit the felony murder in order to defend against the premeditated murder, that is not a double jeopardy issue whatsoever. Appellant may be forced to argue inconsistent defenses on account of his admissions or confessions or because of the state's proof. As this court is well aware, it is axiomatic that issues of fact and proof have absolutely nothing to do with a double jeopardy issue.

Under section 812.025, Florida Statutes (1985), a jury must be instructed to return a verdict of either grand theft or dealing in stolen property, but not both, when a defendant is charged with both offenses. No such explicit statute exists for the circumstances presented in this issue. As such, the trial court's submission of two separate homicide verdicts is entirely proper. Even if the requirements of section 812.025 included instructions relating to felony and premeditated murder, the "error" would certainly be harmless. In Jones v. State, 453 So.2d 1192, 1194 (Fla. 3d DCA 1984), a defendant was convicted for both dealing in stolen property and grand theft. The grand theft conviction was vacated. The remedy was not to reverse the entire proceedings and have a new trial. Under appellant's theory, in Houser v. State, 474 So.2d 1193 (Fla. 1985), this court would have vacated both convictions and remanded for a new trial. What this court actually did was to uphold the conviction for DWI manslaughter but vacate the conviction for vehicular homicide. That was exactly what the trial court did in the instant case; it vacated one of the convictions. Hence, the trial court has anticipated what this court would do. This issue is meritless.

POINT IV

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTIONS TO SUPPRESS HIS STATEMENTS.

A trial court's order that a confession was freely and voluntarily made comes to an appellate court with a presumption of correctness. This court has declared that it will not substitute its views of credibility or weight of conflicting evidence for that of the trial court. Stone v. State, 378 So.2d 765, 769-770 (Fla. 1980).

A brief review of the evidence at the suppression hearing is in order.

Deputy McCormick, who obtained the statements had known appellant based on prior encounters (R 2041). He arrested appellant for the present offense about 9:00 o'clock at night in the parking lot of an apartment complex (R 2046). Appellant, at that time, asked what was going on. The witness replied that he could not talk to him at that time but someone else would be present in a few minutes to talk with him (R 2050). Shortly thereafter, Lieutenant Fair arrived. He told appellant what he was arrested for and advised him of his Miranda rights (R 2050-2052). Lieutenant Fair indicated that appellant initially volunteered that he did not commit the crime (R 2087). Lieutenant Fair testified that he explained to appellant:

> We felt that we could prove that he had caused the death, that there were other people that we were searching for. And in fact, he was in serious trouble. I reiterated that he was going to be charged with first degree murder and robbery and I told him what the penalty was for that. That it would range anywhere from life imprisonment to the death penalty.

(R 2087-2088).

Deputy McCormick explained that based on his past experience with appellant, appellant appeared to be sober. Appellant and Deputy McCormick entered Lieutenant Fair's car (R 2052). The deputy helped appellant smoke a

cigarette and "chit chatted" with him. Again, appellant inquired about what was happening. Deputy McCormick stated that he was "straight" with the appellant and indicated that certain witnesses were going to testify against him but he did not know exactly what the witnesses would say. Appellant was then transferred to a marked patrol car (R 2053). Appellant started "squirming" in the patrol car so Deputy McCormick was asked to go into the patrol car with him. McCormick complied (R 2053-2054).

Again Deputy McCormick shared a cigarette with appellant. The deputy asked appellant what occurred. Appellant related facts about planning the burglary. Then appellant asked if this information would be confidential. The deputy explained that it could not be. Appellant continued with his admissions (R 2054, 2071-2072).

At first, appellant explained that he found the victim already dead and stole his jewelry and left. Deputy McCormick told appellant that he knew he wouldn't have personally gone into the apartment to hurt someone. Then appellant explained that he was at the apartment when the victim came home unexpectedly (R 2055). On cross-examination, Deputy McCormick explained that he believed appellant was of normal intelligence even though he was not educated because of poor schooling habits (R 2058). He also explained that appellant was always open and friendly with him (R 2060). The deputy acknowledged that his interview technique was to make appellant comfortable and to relax (R 2020, 2071).

Appellant first maintains that the admissions were improperly induced because of a "threat" of the electric chair as mentioned by Lieutenant Fair. The testimony of Lieutenant Fair cannot in any way be construed as a threat, especially in light of the fact that appellant was asking him what was "going on." Lieutenant Fair merely informed appellant of the charges and the

possible penalties in answer to appellant's request (R 2087-2088). Appellant testified that this testimony was more of a threat, but any conflicts between appellant's version of the events and Lieutenant Fair's testimony were resolved against appellant (R 2093). See, Burch v. State, 343 So.2d 831 (Fla. 1977). In any event, it was not Lieutenant Fair who obtained the confession. Deputy McCormick, who made an effort to relax appellant, was the one who actually heard the admissions. So even if one assumes for the sake of argument that there was some type of initial threat, such a taint was certainly vitiated based upon the fact that it was a different police officer who heard the admissions and the fact that the officer tried to create a relaxed atmosphere. See Leon v. State, 410 So.2d 201 (Fla. 3d DCA 1982), holding that initial police violence against a defendant to learn the whereabouts of the victim would not vitiate a later confession where different officers obtained that confession and where no violence or improper methods were used to elicit the confession.

Appellant next claims that Deputy McCormick used methods designed to make appellant comfortable enough with him so that he was likely to talk. Such an argument is insufficient on its face to demonstrate any improper methods. Nothing that Deputy McCormick did could be remotely construed as promises or psychological ploys to obtain the statements. The mere fact that appellant regarded Deputy McCormick as a friend or that kindness was shown by the deputy to appellant would certainly not rise to the level of improper influence. Similar arguments were rejected by this court in Oats v. State, 446 So.2d 90, 93 (Fla. 1984) and Cannady v. State, 427 So.2d 723 (Fla. 1983).

Appellant also maintains that his request to speak to Deputy McCormick in confidence also negates the voluntariness of the admissions. Deputy McCormick, however, made it very clear that none of the statements would be in

confidence (R 2054). Despite that clarification, appellant still continued to give admissions. In Colorado v. Connelly, ___U.S.___, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986), the Supreme Court held that a confession could not be suppressed based upon a defendant's subjective state of mind because such a state of mind would not be a function of police conduct which was otherwise proper. Deputy McCormick never misled appellant in this regard. On the contrary, he made it clear that the statements could not be confidential.

Appellant asserts that his youth was another factor which militated against the admissibility of the admissions. That a confession is made by a juvenile does not render it ipso facto involuntary. Ross v. State, 386 So.2d 1191, 1195 (Fla. 1980); Postell v. State, 383 So.2d 1159 (Fla. 1980) (upholding the admission of a confession made by a juvenile four years younger than appellant).

Finally, appellant contends that under section 39.03(3), Florida Statutes (1985), the failure of the police to notify appellant's parents vitiates the confessions. This argument may be rejected based upon procedure or substance or both.

At the suppression hearing, appellant claimed he asked the deputy to call his parents but that the police did not comply (R 2092). At a later hearing, Deputy McCormick was recalled and testified there was no discussion about appellant requesting the deputy to call his parents (R 2027). The deputy was positive that if appellant had asked him to call his parents he would have complied (R 2128-2129). The trial court in denying the motion to suppress simply made a factual determination that appellant did not advise the police to call his parents (R 3225). At trial, appellant's attorney was arguing that the confession was involuntary if appellant had asked the police to call his parents and the police did not allow him to do that. Defense counsel

acknowledged that if the trial court made a factual determination that the request was never made by his client, then the case of Doerr v. State, 383 So.2d 905 (Fla. 1980), would render the argument moot (R 2100, 2102). Appellant now argues that the simple failure of the police to notify the parents under section 39.03(3), renders the admissions involuntary, whether or not appellant made a specific request. As a procedural matter, the appellate argument was not made and, indeed, explicitly disavowed at the trial level. As such, the issue cannot be cognizable on appeal. Steinhorst, supra, at 338.

Assuming for the sake of argument that the contention was preserved, appellant does acknowledge the holding of Doerr, supra. Under that case, the failure of the police to notify the parents was only one fact to be taken into consideration in issues of this nature. It certainly would not call for exclusion per se of a confession. Section 39.03(3) makes it clear that the purpose of this statute is not to notify parents before obtaining confessions from juveniles, but to notify parents in the event that a decision is made to detain the child pending arraignment. Appellant was seventeen years old, and there was information disclosed to the police that he was not living at home but living with four other persons in a motel (R 2078). As such, the fact that the police did not notify the parents would have no bearing on this issue. In any event, as indicated in Postell, supra, the court must look to the totality of the circumstances. When one looks at the overall circumstances, it is clear that there was absolutely no conduct by the police which improperly induced appellant to make the contested confession.

POINT V

THE RECORD REVEALS NO ERRORS WERE COMMITTED AT TRIAL BASED UPON THE CONTESTED ISSUES HEREIN AND, ASSUMING FOR THE SAKE OF ARGUMENT THAT THERE WAS ANY ERROR, SUCH ERRORS WOULD EITHER SINGLY OR COLLECTIVELY BE RENDERED HARMLESS BY THE OVERWHELMING EVIDENCE OF GUILT.

Appellee will answer each of the sub-allegations in this point in the same order as in appellant's brief. Appellee will then make a harmless error argument as a final subpoint.

A. Alleged Admission of Gruesome Photographs

During the course of the trial, the defense counsel made an objection to a number of photographs which included external photographs of the victim as well as autopsy photographs. Defense counsel did explicitly state he had no objection to the autopsy photograph noted as Exhibit B (R 292-295, 3241G). As to both the external photographs and the autopsy photographs, the trial court excluded some as cumulative (R 293-297).

Since appellant is primarily objecting to the autopsy photographs, appellee would note that the prosecutor announced that a number of these autopsy photos were excluded, i.e. Exhibit D-Z, E-A, E-C, E-F, E-G (R 3241G). Hence only four autopsy photographs were actually admitted: Exhibit D-Y, E-D, E-E, E-H (R 3241G). The latter photographs were each of a different part of the victim's head. There were no duplicates.

In Jackson v. State, 359 So.2d 1190 (Fla. 1978), this court acknowledged that the contested pictures were gruesome but held that, nevertheless, the photographs would be admissible if they were relevant. In Straight v. State, 397 So.2d 903, 906-907 (Fla. 1981), the contested photographs depicted the victim's body wounds and were especially gruesome because the body was in a state of decomposition. Nevertheless, this court held that the photos were relevant to show how the wounds were inflicted and distinguished the case of

Young v. State, 234 So.2d 341 (Fla. 1970), because the latter case pertained to the admissibility of forty-five gruesome photgraphs which were cumulative and repetitive.

There is no contention either on appeal or below that the contested pictures are duplicates. Nor is there any argument that the medical examiner did not need any of the contested photographs that were actually admitted. Indeed, defense counsel below acknowledged that the injuries were in issue based upon whether a hammer or a sledgehammer handle was used to kill the victim (R 292). As noted above, the pictures show different areas and cannot be considered cumulative. Hence, the trial court committed no error. See, Swan v. State, 322 So.2d 485, 486 (Fla. 1975), holding that gruesome and gory photographs including autopsy pictures were admissible in a first degree murder case; Henderson v. State, 463 So.2d 196, 200 (Fla. 1985), holding, "Those whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments."

B. The Trial Court was Correct in Disallowing Cumulative Evidence to Show Alleged Bias of the Witness, Mary Holscher and, Assuming for the Sake of Argument that the Error Occurred, it Would be Harmless.

Appellant claims that he sought to show bias on the part of Mary Holscher, when appellant proffered evidence from Tim Kaye that she was involved in a sexual relationship with the co-defendant, John Bruce Haskell (R 789). First of all, the proffer was insufficient (R 787). Tim Kaye testified that the co-defendant, he, and Mary Holscher were living together prior to the time that they moved into the River Edge Motel with appellant. He also testified that this arrangement entailed the co-defendant, Mary, and himself (Tim Kaye) switching off sleeping in the bed (R 788). After the group moved into the River Edge Motel, Tim Kaye could not testify that Mary slept with the co-defendant or not. That proffer did not even establish that Tim Kaye could

testify positively that the co-defendant and Mary Holscher had a prior affair. See, Nelson v. State, 395 So.2d 176, 177-178 (Fla. 1st DCA 1980), holding that the predicate and proffer were both insufficient to allow impeachment of store employees' knowledge of store and personnel liability pursuant to a false arrest for shoplifting.

Secondly, even if a proper proffer was set forth, the testimony would be needless presentation of cumulative evidence. Mary Holscher freely admitted that she dated the co-defendant on a prior occasion, as was pointed out by the trial court (R 667, 789). Defense counsel admitted that the tesitmony was purely supportive (R 789). Moreover, the jury heard from a defense witness that Mary and the co-defendant had dated on a prior occasion (R 1012). Another defense witness, Stacey Stuckert, also testified that the co-defendant and Mary Holscher had dated on a prior occasion (R 1039-1040). (On cross-examination, it was established that this witness indicated at one time that she had never seen Mary with the co-defendant but only with the appellant (R 1045).)

Such evidence would be inadmissible because it would confuse and mislead the jury. It is appellant's premise that such testimony would show bias because Mary wanted to fabricate a story against appellant to protect the co-defendant. Yet many of Mary's statements implicate the co-defendant, as well as the appellant in felony murder, albeit not to the same extent as appellant (R 663, 673).

The jury would certainly be misled because the alleged relationship occurred four to five months before Mary dated appellant. Not only did Mary establish the latter premise, but those facts were corroborated by appellant's own witnesses (R 1016, 1023, 1027). At trial, the defense never attempted to show or deny that appellant and Mary were boyfriend and girlfriend at the time

of the crimes. Indeed, during cross-examination, Mary explained that she obtained the information about the crimes from the appellant instead of the co-defendant because she was closer to the appellant (R 674). In Lee v. State, 422 So.2d 928, 931 (Fla. 3d DCA 1982), it was explained that evidence of bias may be inadmissible when it creates a danger of confusion of the issues or misleading of the jury or results in needless presentation of cumulative evidence. All three reasons support the trial court's decision not to allow this testimony.

Finally, in the context of Mary Holscher's testimony, the exclusion of this evidence would certainly be harmless, assuming arguendo that it was improperly excluded. See Engram v. State, 405 So.2d 428 (Fla. 1st DCA 1981), holding that the defense should have been allowed to present details of a plea by a state witness but where the error was held harmless where the jury was informed that the witness agreed with the state to testify against the defendant in exchange for a reduced sentence and where this same witness admitted that he would lie to stay outside of jail and had lied on prior occasions. As noted above, this evidence would be cumulative.

Additionally, attacks on Mary Holscher's credibility would be (and were) totally fruitless inasmuch as the statements she heard from appellant were corroborated by critical details in the crime investigation. Such details could only have been known by appellant. The defense did not (and could not) demonstrate that Mary's testimony was based upon her knowledge of the police investigation. Mary testified that appellant directed her to a ditch where the victim's wallet was eventually found (R 1103, 3241F). She indicated that just after the crimes occurred, she saw appellant wearing a necklace and noticed a distinctive ring that he had. She even indicated that appellant placed this ring in his pocket (R 652, 665). When Deputy McCormick arrested

appellant, appellant was wearing the necklace, and the deputy found the ring in his pocket (R 848, 850). Mary testified that just after the offense occurred, appellant was wearing bloody tennis shoes (R 652). These shoes were recovered and the state established that there was blood on them (R 938-939, 3241F). Mary indicated that appellant took jewelry from a closet, a most unusual place to keep jewelry (R 659). The victim's son testified that this jewelry was, indeed, kept in the closet (R 429). Mary stated that the weapon that appellant originally said he was to use in the murder was an ax handle (R 663-664). This ax handle was found on the victim's premises and it was established that there was blood on the handle (R 372, 409, 935, 950, 3241D). Mary informed the jury that appellant said he initially was going to use the ax handle but instead he used a golden hammer which was already in the victim's apartment (R 663-664). Both Marie Atkinson (the victim's girlfriend) and the victim's son informed the jury that these gold hammers were, indeed, part of the victim's possessions and were awards (R 420, 1278). Appellant also told Mary that he and the co-defendant used a glove and sock on their hands during the commission of the crimes (R 698). Again, the state established that some of these items had blood on them (R 958, 3241F). Appellant told Mary that they ransacked the apartment, obtained jewelry, cooked soup and waited for the victim to come home (R 663). Independent testimony corroborated the fact that the apartment was ransacked (R 275, 361). Independent evidence also established that someone indeed, had used a microwave oven to heat up a bowl of soup (R 589-590). When one compares the appellant's admissions to Mary's testimony, and then compares her testimony to the independent corroborating evidence, there is no question that the contested testimony would make no difference whatsoever.

C. Alleged Hearsay.

Appellant's third complaint about the trial involves testimony of state's witness Tim Kaye who testified that he heard appellant and the co-defendant planning to burglarize the victim's house. Specifically, appellant takes issue with the remark that Kaye heard either appellant or the co-defendant discuss plans to hit the victim over the head with a mallet (R 893). Kaye did not remember if it was appellant or the co-defendant who said it (R 899).

This testimony was admissible, assuming that it was the co-defendant who made the statement, under section 90.803(18)(e), Florida Statutes (1985). Honchell v. State, 257 So.2d 889 (Fla. 1971); Bourjaily v. United States, ___U.S.___, 107 S.Ct. 2775, ___L.Ed.2d___ (1987); United States v. Inadi, ___U.S.___, 106 S.Ct. 1121, ___L.Ed.2d___ (1986), holding that the government does not need to show the unavailability of the co-defendant as a condition to the admission of the out-of-court statements of a non-testifying co-conspirator. These latter three cases stand for the general proposition that a co-conspirator's statement concerning the conspiracy is admissible as long as the state has other independent evidence of that conspiracy. As the trial court noted, Tresvant v. State, 396 So.2d 733 (Fla. 3d DCA 1981), allowed the admissibility of such testimony under section 90.803(18)(e), notwithstanding that a conspiracy was not actually charged. Tresvant explained that all that was needed was independent proof of the conspiracy.

Undoubtedly there was ample independent proof of the conspiracy and the fruits of the conspiracy, the substantive crimes themselves. Tim Kaye testified, without objection, that he heard appellant and the co-defendant talk about burglarizing the victim's abode and the possibility of knocking the victim out with their fists (R 870, 890-891). Frank Clauser, testifying for the state, heard appellant and the co-defendant talk about breaking into an old man's home in West Melbourne (R 781-782). Mary Holscher tesified that

just after the crimes, appellant told her that they both hid and waited for the victim to come home. Appellant indicated that he had an ax handle to use for this purpose but the ceiling was too low so that he had to use a hammer found in the apartment instead (R 663-664). An ax handle was found at the crime scene (R 372). When one considers the enormous amount of evidence recovered from the crime scene along with all the admissions made by appellant not only to Mary Holscher but to Deputy McCormick, there is no doubt that there is ample independent evidence to sustain the trial court's ruling that such testimony was admissible, assuming for the sake of argument that it was the co-defendant who made the contested statement.

Appellant maintains that section 90.804(2)(c), Florida Statutes (1985), precludes the admission of this testimony. In Nelson v. State, 490 So.2d 32 (Fla. 1986), evidence was precluded under this section based upon a confession of a co-conspirator which was covertly tape-recorded and played for the jury. The opinion, however, explained that this testimony could have been admissible under section 90.803(18)(e), if the statement was substantiated by independent evidence of a conspiracy and the appellant's participation in that conspiracy. As noted above, there was such independent evidence in the present case. As such, the testimony was admissible under 90.803(18)(e).

This testimony was likewise admissible under section 90.803(18)(b), Florida Statutes (1985), which allows a statement that is offered against a party when the party has manifested his adoption or belief in the truth of that statement. The contested testimony in Tresvant, supra, was also admitted under this theory. See also, Phillips v. State, 177 So.2d 243 (Fla. 1st DCA 1965), where, in charging a defendant for a possession of an illegal still, it was held that the co-defendant's statement, said in the presence of the defendant and police officers, that "if the beverage agents had just been a

day or so later everything would have been cleared out" was held admissible because the defendant made no response or denial of that statement. Likewise, appellant made no denial or protest when this comment was made. Indeed, Tim Kaye's testimony was that both appellant and co-defendant were discussing the plans and it could have been that appellant actually made the statement. In any event, there is no question that appellant adopted the statement of the co-defendant based upon Mr. Kaye's testimony (R 870, 890-891).

As to the felony murder and all the other offenses, based upon appellant's testimony, there is no question that any alleged error in the admission of this testimony would be harmless. Appellant admitted talking about going to the victim's business to burglarize it (R 1064-1065). Although appellant's initial story was that he only entered the downstairs business to look for narcotics, he eventually went upstairs because he heard an apparent scuffle and then saw the victim dead on the floor (R 1069, 1071-1073). But while appellant was inside the apartment, he took the victim's jewelry and some cash (R 1075-1076). Although it was the defense theory that appellant did not originally have the intent to go into the victim's apartment, burglary is defined to include entering or remaining with an intent to commit an offense therein. (emphasis supplied). § 810.02(1), Florida Statutes (1985).

Likewise there was overwhelming evidence of premeditated murder. As discussed in subpoint C, the admissions to Mary Holscher's were corroborated by the police investigation at the crime scene, in the car which the perpetrators used, and in the property recovered from the appellant. Of course, it is not necessary that the state prove that the appellant planned the murder long before he entered the victim's premises. See, Subpoint D, infra.

D. Alleged Failure to Grant a Judgment of Acquittal Pursuant to Premeditated Murder.

Appellant maintains that the state only proved felony murder, not premeditated murder, and argues that appellant's own admissions buttress this conclusion. Therefore, so the argument goes, a judgment of acquittal should have been granted pursuant to the premeditated murder indictment.

This court established long ago that the question of premeditated murder is one of fact that may be established by the jury from all the evidence. Robinson v. State, 3 So.2d 804 (Fla. 1941). In Middleton v. State. 426 So.2d 548 (Fla. 1982), a victim's body was found in her house. The cause of death was due to a shotgun wound in the back of her head. The appellant was picked up on unrelated charges and confessed. On appeal, he claimed that the decision to kill the victim was a "snap" decision and therefore the evidence was insufficient to prove premeditation. This court noted that Middleton sat for an hour contemplating the death of the victim. Whether the decision was a "snap" decision or whether it was contemplated for a significant period of time made no difference in that court's holding. "In either event, that the decision was made at all is sufficient to prove premeditation." Id. at 550. This court explained that a defendant does not need to think or reflect for any minimum duration of time in order for the jury to convict him of premeditated murder. In this case, appellant confessed to Mary Holscher that after they had ransacked the house, they cooked soup and waited for the victim to return to his apartment (R 663). Appellant admitted that he had an ax handle but since he was so tall, the ax handle would scrape against the ceiling so he used a golden hammer which he found in the apartment (R 663-664). An ax handle or sledgehammer handle was recovered at the scene (R 409, 683-684). Although this evidence would definitely show that appellant planned and contemplated the murder, even if appellant speculates that the decision to kill the victim was a "snap" decision, it would make no difference.

There is still another factor to be considered in this question. In Preston v. State, 444 So.2d 939, 944 (Fla. 1984), this court held that premeditated murder could be demonstrated by circumstantial evidence. The evidence can demonstrate a premeditated design (thus a jury question) due to the nature and the manner of the wounds inflicted, the weapon, and the absence of provocation. Again, this court reiterated that any definite length of time in contemplating the murder was not required. Hence, the jury could decide that the murder was premeditated by the amount and severity of the head wounds. The medical examiner described in great detail the severe nature of these wounds (R 296-304). He opined that heavy force was used (R 311). Also noteworthy, is his testimony that the victim's hand was swollen, which would be consistent with a defensive wound (R 308, 311).

In Griffin v. State, 474 So.2d 777, 779-780 (Fla. 1985), the defendant was charged with premeditated and felony murder. The defendant argued that the evidence was sufficient only to prove felony murder. The court rejected that argument, explaining that the jury could decide that the store clerk, shot in a robbery, was the victim of a premeditated murder because there was no evidence that the clerk precipitated an accidential murder or that the shooting was reflexive. The same reasoning is applicable to the case at bar. The case under review is even stronger because the appellant admitted obtaining a weapon and waiting for the victim in hiding. When one considers the severity of the wounds, there is no question that the state had more than ample evidence to submit to the jury on the issue of premeditated murder.

E. Refusal to Give the Circumstantial Evidence Jury Instruction

Appellant maintains it was prejudicial error not to give the circumstantial jury instruction, notwithstanding that such an instruction is obsolete. Appellant acknowledges this court's holding in In The Matter of

Florida Standard Jury Instructions in Criminal Cases, 431 So.2d 594 (Fla. 1981). In that case, this court quoted from the case of Holland v. U.S., 348 U.S. 121, 139-140, 75 S.Ct. 127, 139, 99 L.Ed. (1954) (which abolished the circumstantial evidence instruction), as follows: "[T]he better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect." Later on in the opinion, this court explained that the giving of the proposed instructions on reasonable doubt in the burden of proof rendered this instruction unnecessary. Based on the above, the trial court did not abuse its discretion in refusing to give this instruction, even though a trial court is not totally prohibited from giving such an instruction. See also, White v. State, 446 So.2d 1031, 1035 (Fla. 1984).

Such an instruction is not only superfluous, but under the facts in this case, totally unwarranted. There was direct evidence against the appellant based upon his admission/confession to Mary Holscher, Tim Kaye, and Deputy McCormick (R 663-664, 854, 870, 890-891). In Dunn v. State, 454 So.2d 641, 642 (Fla. 5th DCA 1984), it was held that a confession of guilt to another citizen constituted direct evidence - not circumstantial evidence. As such, all these prior admissions constitute direct evidence; therefore, this instruction would be misleading.

F. The Alleged Trial Errors Would be Rendered Harmless Based Upon the Overwhelming Evidence of Guilt

Assuming for the sake of argument that the trial court did err in each of these issues under Point V, such errors would be harmless based upon the overwhelming evidence of guilt. Not one of the issues argued in this point would constitute prejudicial error, not only because the issues are de minimus in themselves, but also because the alleged errors would be rendered harmless based on the overwhelming evidence of guilt. Not only was a mass of physical

evidence collected at the murder scene, at the motel where appellant and the co-defendant were living, from appellant's person, and from the car he was driving at the time of the arrest, but such physical evidence was also corroborated by the admissions made to Mary Holscher, Tim Kaye, and Deputy McCormick. See, Subpoint C, and the Statement of Facts-Guilt Phase, supra. § 924.33,, Florida Statutes (1985).

POINT VI

A GUIDELINES SCORESHEET WAS UNNECESSARY AND SINCE THE SENTENCE WAS LEGAL, APPELLANT'S FAILURE TO OBJECT BARS APPELLATE REVIEW

Appellant notes that the record does not have a guidelines scoresheet although the appellant received forty years imprisonment for the burglary and five years concurrent for the grand theft (R 3327-3329). Appellant does not argue that this sentence is illegal. Indeed, such an argument would be fruitless inasmuch as this court has held that an unscored capital offense can be used as a basis to depart from the guidelines. Hansbrough v. State, 509 So.2d 1081, 1087 (Fla. 1987); Weems v. State, 469 So.2d 128 (Fla. 1985) (juvenile offenses).

Since the sentence is not illegal, appellee submits that the lack of an objection to the failure to prepare and submit a guidelines scoresheet would bar appellate review (R 2224, 2228). In State v. Whitfield, 487 So.2d 1045 (Fla. 1986), this court held that sentencing errors which do not produce an illegal sentence or unauthorized departure still require a contemporaneous objection.

Furthermore, the lengthy written sentencing order pursuant to section 921.141, would make a guidelines sentencing scoresheet superfluous. The trial court went into great detail about the circumstances surrounding the murder/burglary/grand theft (R 3331-3334). The trial court found that the homicide was done pursuant to a burglary with an assault. He found the circumstances of the murder heinous, atrocious or cruel and that the offenses were committed in a cold, calculated and premeditated manner. A sentencing guidelines scoresheet would be totally unnecessary, especially in light of the detailed written sentencing order.

POINT VII

THE DEATH PENALTY IN FLORIDA IS CONSTITUTIONAL BOTH ON ITS FACE AND AS APPLIED, AND THE SPECIFIC ARGUMENTS ON APPEAL CHALLENGING THE DEATH PENALTY IN FLORIDA HAVE NOT BEEN PRESERVED BELOW.

Appellant has raised numerous objections to the constitutionality of the death penalty pursuant to section 921.141. Appellee has quantified them into eleven objections. Appellant acknowledges that these objections have been rejected but nevertheless re-asserts them.

Appellee perceives eleven separate objections in this point. Of all those objections, appellee submits almost none have been argued below. Therefore, these issues may not be considered for the first time on appellate review. Toward the end of the point, appellant argues that the death penalty is not reviewed in a proportional manner and leads to inconsistent and capricious results. This argument was preserved below (R 3355)*.

There are two motions which seek to declare the death penalty unconstitutional because it is carried out through electrocution (R 3108, 3173). However, both of these motions are signed by appellant's former attorney, Joe Mitchell. Mr. Mitchell withdrew from this case (R 3087, 3227). In the absence of anything in the record which indicates that appellant's trial attorney adopted these motions, appellee submits that this issue, likewise, has not been preserved. There were a number of motions challenging the constitutionality of the death penalty, but those motions were either filed by Mr. Mitchell or did not entail the specific grounds argued on appeal (R 3090, 3108-3109, 3110-3112, 3173, 3354-3356). In Eutzy, supra, the

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*As a corollary to this argument, appellant maintains that this court has not made an independent determination of the death penalty in this case. Appellee submits this argument was never presented below either.

defendant argued for the first time on appeal that the statutory authority granted a trial judge to override a jury's recommendation of life is unconstitutional as applied. This court held that the issue was not timely raised before the trial court and thus was not preserved for appellate review. Id. at 757. See also, Trushin v. State, 425 So.2d 1126 (Fla. 1983).

Although appellee urges this court to dismiss these arguments based upon procedural grounds, appellee will address the merits of each argument. Appellant claimed the capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances outweigh the mitigating factors. The United States Supreme Court in Zant v. Stephens, 462 U.S. 862, 890-891, 103 S.Ct. 2733, 2750, 77 L.Ed.2d 235 (1983), explicitly rejected this argument.

Next, appellant argued that the aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner. First of all, this argument is vague in itself. Secondly, this generalized argument has not been applied to the facts in the case at bar. In any event, the United States Supreme Court in Proffitt v. Florida, 428 U.S. 242, 254, 96 S.Ct. 2960, 2967, 49 L.Ed.2d 913 (1976), explicitly held that the Florida capital sentencing procedures, as they are written, seek to assure that the death penalty is not imposed in an arbitrary or capricious manner.

Appellant claimed that the Florida capital sentencing process at both the trial and appellate level does not provide for individualized sentencing determinations through the application of presumptions, mitigating evidence and factors. Again, this argument is vague and general and is not applied to the facts in the case at bar. Secondly, this argument is anticipatory in that it assumes that this court will exercise its appellate review in an erroneous

manner. In any event, Proffitt, supra, held that the statute is so written that it would channel such decisions on the basis of individualized circumstances. Id. 428 U.S. at 251, 96 S.Ct. at 2966. See also, Spinklelink v. Wainwright, 578 F.2d 582, 605 (1978), cert denied, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979), holding that the Florida capital sentencing statute removed arbitrariness and capriciousness from death penalty sentences.

Appellant's next argument is that the failure to provide the appellant with notice of the aggravating circumstances, specifically those circumstances on which the state seeks to rely, deprives the defendant of due process of law. This argument was specifically addressed and rejected in Sireci v. State, 399 So.2d 964, 970 (Fla. 1981).

Next, appellant maintains that execution by electrocution is cruel and unusual punishment. This argument also has been explicitly rejected by this court. Booker v. State, 397 So.2d 910, 918 (Fla. 1981).

Appellant maintains that the Florida capital sentencing statute should require that a recommendation be by a unanimous or substantial majority. Appellant does not define by what he means by "substantial majority." Nevertheless, this court has explicitly rejected this argument in James v. State, 453 So.2d 786, 792 (Fla. 1984).

Appellant re-raises the issue that the capital sentencing system allows exclusion of jurors for their own views on capital punishment. This court dismissed this issue in Lambrix v. State, 494 So.2d 1143, 1145 (Fla. 1986). In doing so, this court noted that this issue was decided in Lockhart v. McCree, 476 U.S. ___, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986).

Appellant maintains that if an aggravating factor is found improper on appeal, then the sentence must **always** be remanded to the trial court. Again,

appellee asserts that an anticipatory argument of this nature should be rejected. This court has not followed appellant's recommendation. Brown v. State, 381 So.2d 690, 696 (Fla. 1980); Armstrong v. State, 429 So.2d 287, 291 (Fla. 1983). The same argument was considered by the United States Supreme Court and explicitly rejected in Barclay v. Florida, 463 U.S. 940, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983).

Appellant maintains that section 921.141(5)(i) (cold and calculated) is unconstitutional. This court considered and explicitly rejected this challenge. Jent v. State, 408 So.2d 1024, 1032 (Fla. 1981).

In the last challenge, appellant maintains that this court has not, but should have, reviewed death sentences to insure that similar results are reached in similar cases. Such an argument is not only anticipatory, but additionally very speculative. As this court has noted, proportionality review is not a federal constitutional requirement, but is only a state imposed law. State v. Henry, 456 So.2d 466, 469 (Fla. 1984).

CONCLUSION

Based on the arguments and authorities presented herein, appellee respectfully prays this honorable court affirm the judgment and sentence of the trial court in all respects.

Respectfully submitted

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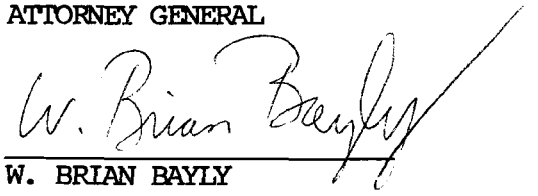

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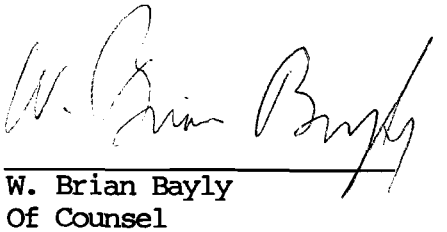
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Answer Brief of Appellee has been furnished by mail to Assistant Public Defender Michael S. Becker, 112 Orange Avenue, Suite A, Daytona Beach, FL 32014, this 30th day of November, 1987.



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